(28,980)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1922.

# No. 430.

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THE CITY OF TRENTON, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF NEW JERSEY.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 29, 1922.

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1 To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey and President Judge of the Court of Errors and Appeals of the State of New Jersey:

And now comes the City of Trenton, a municipal corporation of the State of New Jersey, and represents that on the sixth day of March, 1922, a final judgment was duly entered by the Court of Errors and Appeals of the State of New Jersey, affirming the judgment entered by the New Jersey Supreme Court in an action at law, wherein the State of New Jersey was plaintiff and the City of Trenton was defendant, and awarding costs in favor of the State of New Jersey.

That this is an action instituted by the State of New Jersey against the City of Trenton to recover from it the sum of Fourteen Thousand Three Hundred Ten ($14,310.00) dollars, being the amount of certain license fees claimed to be due to said State from said City for water abstracted from the Delaware River, for the following periods of time: the year ending June 30, 1909, the year ending June 30, 1910, the year ending June 30, 1911, the year ending June 30, 1912 the year ending June 30, 1913, the year ending June 30, 1914, the year ending June 30, 1915, and the year ending December 31, 1916, the year ending December 31, 1917, the year ending December 31, 1918, and the year ending December 31, 1919, which license fees were assessed upon the said City of Trenton by the Board of Conservation and Development in execution of the powers conferred upon it by the act of June 17th, 1907, entitled, "An Act to establish a state water supply commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted," and supplemental legislation.

2 That section 8 of said act provides that "every municipality, corporation or private person now diverting the water of streams or lakes with outlets, for the purpose of a water supply, shall make annual payments on the first day of May to the State Treasurer for all such water hereafter diverted in excess of the amount now being legally diverted," the payment to be considered as a license fee and its amount to be fixed by the Board of Conservation and Development at a rate of not less than One Dollar or more than Ten Dollars per million gallons.

The complaint in the case shows that at the time of the enactment of the statute, to wit, June 17, 1907, the City of Trenton was diverting from the Delaware River daily 14,200,000 gallons of water, and that said amount of water was then "being legally diverted" and concedes that the diversion to that extent was permitted by the state. The moneys claimed to be due the State were for fees assessed by the Board of Conservation and Development upon the water diverted by the City of Trenton from the Delaware River in excess of the number of gallons hereinbefore, mentioned, assessed at the rate of One Dollar per million gallons.

The City of Trenton by its answer denies the power of the Board of Conservation and Development to assess said license fees against

it upon the ground that Section 8 of said statute of June 17, 1907, impairs the obligation of a contract and offends against Article 1, Section 10, paragraph 1 of the Constitution of the United States in this respect; that at the time of the enactment of said statute of June 17, 1907, the City of Trenton require- all the water used and taken for its corporate purposes, and had and possessed the right to use and take all the water from the Delaware River that it required for such purposes without the payment of any license fee for any part of the water so used and taken during the time or times specified in each of the several counts of said complaint, and at all times, which said right was acquired by "The Trenton Water Works" by grant direct from the State of New Jersey, March 24, 1852, and was acquired by the said City of Trenton by duly authorized purchase of
3 such right from the said "The Trenton Water Works."

And your petitioner further avers that in its said answer it expressly charged that Section 8 of said Act of June 17, 1907, being Chapter 252 of the Laws of 1907, impairs the obligation of a contract and offends against Article I, Section 10, paragraph 1 of the Constitution of the United States, as a separate defense to each of the counts set out in the State's complaint.

And your petitioner further avers that at the argument of said cause, both in the Supreme Court of the State of New Jersey and in the Court of Errors and Appeals of the State of New Jersey, it expressly made the following federal claims, to wit:

(*a*) That the Act of June 17, 1907, entitled, "An Act to establish a state water supply commission, and to define its powers and duties and the conditions under which waters of this State may be diverted," is unconstitutional because it provides for an arbitrary taking of property owned by your petitioner in its private or proprietary capacity for public use, without just compensation; and

(*b*) That said Act of June 17, 1907, is unconstitutional because it deprives your petitioner of property without due process of law and contravenes the Fourteenth Amendment to the Constitution of the United States.

And your petitioner further avers that said claims were considered, discussed in the opinion, and determined to be invalid by the Court of Errors and Appeals of the State of New Jersey.

That the Court of Errors and Appeals of the State of New Jersey denied the title, right, privilege and immunity thus specially set up and claimed by the petitioner.

And your petitioner further avers that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors, which is filed herewith.

Wherefore your petitioner prays that a writ of error from
4 the Supreme Court of the United States may issue in this case to the Court of Errors and Appeals of the State of New Jersey, if the record in the case has not been remitted to the court below, or to the Supreme Court of the State of New Jersey, if such record has been remitted to that court, for the correction of errors

so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Court having the custody of said record, may be sent to the Supreme Court of the United States as provided by law.

Dated Trenton, N. J.
May 18, 1922.

CHAS. E. BIRD,
*Counsel for Petitioner and Plaintiff in Error.*

5 [Endorsed:] New Jersey Court of Errors and Appeals. State of New Jersey, Plaintiff Appellee, vs. City of Trenton, Defendant Appellant. Petition. Charles E. Bird, Room 304 City Hall, Trenton, N. J., Counsel for Petitioner. Filed May 20, 1922. Enoch L. Johnson, Clerk.

6 In the Supreme Court of the United States.

CITY OF TRENTON, Plaintiff in Error,

vs.

STATE OF NEW JERSEY, Defendant in Error.

*Order Allowing Writ of Error.*

On Reading the petition of the City of Trenton for writ of error and the assignment of errors, and upon due consideration of the record of said cause;

It is ordered, that a writ of error be allowed from the Supreme Court of the United States to the Court of Errors and Appeals of the State of New Jersey, if the record in the case has not been remitted to the court below, or to the Supreme Court of the State of New Jersey, if such record has been remitted to that court, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law, upon condition that the said petitioner and plaintiff in error, the City of Trenton, give security in the sum of Thirty Thousand ($30,000) dollars; that the said plaintiff in error shall prosecute said writ of error to effect and, if said plaintiff in error fails to make its plea good, shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error, the City of Trenton, now presenting a bond in the sum of Thirty Thousand ($30,000) dollars, it is ordered that the same be and hereby is duly approved.

In witness whereof I have hereunto set my hand this 18th
7 day of May, A. D. 1922.

E. R. WALKER,
*Chancellor and Presiding Judge of the Court — Errors and Appeals of the State of New Jersey.*

8 [Endorsed:] In the Supreme Court of the United States. City of Trenton, Plaintiff in Error, vs. State of New Jersey, Defendant in Error. Order Allowing Writ of Error. Filed May 20, 1922. Enoch L. Johnson, Clerk.

9 Know all men by these presents, that the City of Trenton, a municipal corporation of the State of New Jersey, is held and firmly bound unto the State of New Jersey in the sum of Thirty Thousand ($30,000) dollars, lawful money of the United States, to which payment well and truly to be made, it binds itself, and each its successors firmly by these presents.

Sealed with its seal. Dated the eighteenth day of May, in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, the above named City of Trenton has sued out a writ of error from the United States Supreme Court to the Court of Errors and Appeals of the State of New Jersey, to reverse the judgment of the said Court of Errors and Appeals of the State of New Jersey rendered on the sixth day of March, A. D. 1922, in the suit of the State of New Jersey v. the City of Trenton.

Now, therefore, the condition of this obligation is such that if the above named City of Trenton shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation is to be void; otherwise to remain in full force and effect.

In witness whereof, and in pursuance of a resolution of the Board of Commissioners of the City of Trenton, N. J., passed on the 12th day of May, 1922, the corporate seal of the said City of Trenton is hereto affixed, and these presents duly signed by the Acting President of said Board of Commissioners, and attested by the City Clerk of said City of Trenton, this 18th day of May, 1922.

[SEAL.] EDWARD W. LEE,
*Acting President of the Board of Commissioners of the City of Trenton, N. J.*

Attest:
LEON D. HIRSH,
*City Clerk.*

10 [Endorsed:] United States Supreme Court. City of Trenton, Plaintiff in Error, vs. State of New Jersey, Defendant in Error. Bond. Approved this 18th day of May, 1922. E. R. Walker, Chancellor of the State of New Jersey and President Judge of the Court of Errors and Appeals of the State of New Jersey. Filed May 20, 1922. Enoch L. Johnson, Clerk.

11 New Jersey Supreme Court.

[Vignette.]

I, Enoch L. Johnson, Clerk of the Supreme Court of the State of New Jersey do hereby certify that the original Bond in the case of City of Trenton, Plaintiff in Error, vs. State of New Jersey, De-

fendant in Error, was lodged in this Office on the Twentieth day of May, Nineteen Hundred and Twenty two.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this 8th day of June, A. D. 1922.

[Seal of the Supreme Court.]

ENOCH L. JOHNSON,
*Clerk.*

12 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of New Jersey, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of New Jersey before you, or some of you, and which was affirmed by the Court of Errors and Appeals of the State of New Jersey, being the Court of last resort in all causes, and the highest Court of law or equity of the said State in which a decision could be had in the said suit between the State of New Jersey and the City of Trenton, wherein was drawn in question the validity of the statute of, or an authority exercised under the said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said City of Trenton as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, D. C., within thirty days from the date thereof, that the record and proceedings afore-
13 said being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, the eighteenth day of of May, in the year of our Lord, one thousand nine hundred and twenty-two.

[SEAL.] GEORGE T. CRANMER,
*Clerk of the District Court of the United States for the District of New Jersey.*
By R. S. CHEVRIER,
*Deputy.*

Allowed by
E. R. WALKER,
*Chancellor of the State of New Jersey,*
*President of the Court of Errors and*
*Appeals of the State of New Jersey.*

14 The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Supreme Court of the United States in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE,
*C. J.*

[Endorsed:] In the Supreme Court of the United States. City of Trenton, Plaintiff in Error, v. State of New Jersey, Defendant in Error. Error to the Supreme Court of the State of New Jersey. Writ of Error. Charles E. Bird, Room 304, City Hall, Trenton, N. J., Counsel for Plaintiff in Error. Filed May 20, 1922. Enoch L. Johnson, Clerk.

15 New Jersey Supreme Court.

[Vignette.]

I, Enoch L. Johnson, Clerk of the Supreme Court of the State of New Jersey do hereby certify that the original Writ of Error in the case of City of Trenton, plaintiff in error vs. State of New Jersey, Defendant in error was lodged in this Office on the Twentieth day of May, Nineteen hundred and twenty-two.

In testimony whereof I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this 8th day of June, A. D. 1922.

[Seal of the Supreme Court.]

ENOCH JOHNSON,
*Clerk.*

16 In the Supreme Court of the United States.

CITY OF TRENTON, Plaintiff in Error,

vs.

STATE OF NEW JERSEY, Defendant in Error.

*Assignment of Errors.*

And now comes the City of Trenton, Petitioner and Plaintiff in Error, by Charles E. Bird, attorney and in connection with its petition for a writ of error shows that, in the record and proceedings

and in the rendering of judgment and decision of the Court of Errors and Appeals of the State of New Jersey, in the above entitled cause, manifest error has intervened to the prejudice of this petitioner and plaintiff in error in this, to wit:

First. The court erred in holding that Section 8 of an act of the legislature of the State of New Jersey entitled, "An Act to establish a state water supply commission, and to define its powers and duties, and the conditions under which waters of this state may be diverted," approved June 17, 1907 (being Chapter 252 of the Laws of 1907) was constitutional, and did not offend against Article I, Section 10, paragraph 1 of the Constitution of the United States, and did not impair the obligation of a Charter contract existing between the State of New Jersey and the City of Trenton, the successor in title of the rights, powers, franchises and privileges granted to
17 "The Trenton Water Works," by force of an act of the legislature of the State of New Jersey entitled, "A supplement to the act entitled, 'An Act to incorporate the proprietors of the Trenton Water Works, passed the twenty-ninth day of February, A. D. One Thousand Eight Hundred and Three,' which supplement was approved March 24, 1852."

Second. The said Court of Errors and Appeals of the State of New Jersey erred in holding that said act of June 17, 1907 (being Chapter 252 of the Laws of 1907) is constitutional, and does not take the property owned by the City of Trenton in its private or proprietary capacity for public use, without just compensation, and does not violate the Fourteenth Amendment to the Constitution of the United States.

Third. The said Court of Errors and Appeals of the State of New Jersey erred in holding that said act of June 17, 1907 (being Chapter 252 of the Laws of 1907) does not deprive the City of Trenton of property without due process of law, and does not contravene the Fourteenth Amendment to the Constitution of the United States.

By reason whereof, this petitioner and plaintiff in error prays that the said judgment of the Court of Errors and Appeals of the State of New Jersey may be reversed, etc.

Dated, Trenton, N. J., 18th day of May, 1922.

CHAS. E. BIRD,
*Counsel for Petitioner and Plaintiff in Error.*

[Endorsed:] In the Supreme Court of the United States. City of Trenton, Plaintiff in Error, vs. State of New Jersey, Defendant in Error. Assignment of Errors. Charles E. Bird, Room 304, City Hall, Trenton, N. J. Counsel for Petitioner and Plaintiff in Error. Filed May 20, 1922. Enoch L. Johnson, Clerk.

18 United States of America to the State of New Jersey, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty (30) days from the date of the service of this citation, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of New Jersey, wherein the City of Trenton, a municipal corporation of the State of New Jersey is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the hand and seal of the Honorable, the Chancellor of the State of New Jersey, President Judge of the Court of Errors and Appeals of the State of New Jersey, this eighteenth day of May, in the year of our Lord one thousand nine hundred and twenty-two.

[SEAL.]

E. R. WALKER,
*Chancellor of the State of New Jersey, President Judge of the Court of Errors and Appeals of the State of New Jersey.*

Attest:

THOS. F. MARTIN,
*Clerk Court of Errors and Appeals of the State of New Jersey.*

Service of this Citation and receipt of a copy thereof for defendant in error acknowledged this 19th day of May, 1922.

THOMAS F. McCRAN,
*Atty. Gen. of New Jersey, Attorney of Defendant in Error.*
WILLIAM NEWCORN,
*Ast. Atty. Gen., Of Counsel.*

19 UNITED STATES OF AMERICA,
*District of New Jersey, ss:*

I hereby certify that I have duly served the attached citation on Thomas F. McCran, Attorney General of the State of New Jersey, as attorney of record for the defendant in error, by handing to and leaving with —— —— a true copy of this writ at the office of the said Attorney General of the State of New Jersey, at the State House, Trenton, New Jersey.

—— ——,
*United States Marshal.*
—— ——,
*Deputy.*

Fees and costs: —.

20 [Endorsed:] In the Supreme Court of the United States. City of Trenton, Plaintiff in Error, vs. State of New Jersey,

Defendant in Error. Error to Supreme Court of the State of New Jersey. Citation. Charles E. Bird, Room 304, City Hall, Trenton, N. J., Counsel for Plaintiff in Error. Filed May 23, 1922. Enoch L. Johnson, Clerk.

21 New Jersey Supreme Court.

STATE OF NEW JERSEY, Plaintiff-Appellee,

v.

CITY OF TRENTON, Defendant-Appellant.

Action at Law.

*Notice and Grounds of Appeal.*

To Honorable Thomas F. McCran, Attorney General of the State of New Jersey:

Take notice, that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in the above entitled cause on the following grounds:

1. The court erred in granting plaintiff's motion to strike out the first separate defense interposed by the defendant.

2. The court erred in granting plaintiff's motion to strike out the second separate defense interposed by the defendant.

3. The court erred in granting plaintiff's motion to strike out the third separate defense interposed by the defendant.

4. The court erred in not permitting the defendant to maintain the first separate defense interposed by it.

5. The court erred in not permitting the defendant to maintain the second separate defense interposed by it.

6. The court erred in not permitting the defendant to maintain the third separate defense interposed by it.

CHAS. E. BIRD,
*Attorney of Defendant-Appellant.*

22 [Endorsed:] New Jersey Supreme Court. State of New Jersey, Plaintiff Appellee, vs. City of Trenton, Defendant Appellant. Action at Law. Notice and Grounds of Appeal. Sat below: Trenchard, J. Chas. E. Bird, Attorney for Defendant Appellant, Room 303, City Hall, Trenton, N. J. Service ack. June 23rd. 1921. Thomas F. McCran, Atty. Gel. William Newcorn, Asst. Atty. General, of Counsel. Filed Jul. 25, 1921. Enoch L. Johnson, Clerk.

23 New Jersey Supreme Court.

STATE OF NEW JERSEY, Plaintiff,

vs.

CITY OF TRENTON, Defendant.

Action at Law. On Postea.

Thomas F. McCran, Attorney General, Attorney.

*Judgment Record.*

City of Trenton, the defendant in this cause was summoned to answer unto State of New Jersey, the plaintiff therein in an action at law upon the following complaint:

(Summons issued February 10, 1921.)

The plaintiff, the State of New Jersey, says:

*First Count.*

1. That the defendant, during the whole of the year ending June 30, 1909, was and still is a municipality of this State.

2. That during the whole of said year ending, as aforesaid, defendant did divert the waters of a certain stream of this State, to wit, the waters of the Delaware River, for the purpose of a public water supply for said municipality and has continuously diverted said water for the purpose aforesaid to and including December 31, 1919.

3. That under the provisions of an act of the legislature of this State entitled "An Act to establish a State Water Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted," approved June 17, 1907, being Chapter 252 of the Session Laws of 1907, the defendant was permitted to divert from the Delaware River aforesaid, an
24 average daily free allowance of water to the amount of 14,200,000 gallons, said last mentioned amount being the amount of water which was being diverted by said municipality on June 17th, aforesaid, the date when the act aforesaid became effective and operative.

4. That the average daily diversion of water by said municipality during the period mentioned in paragraph one was 15,860,000 gallons, said amount so diverted being 1,660,000 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. That by virtue of the provisions of said act said defendant then and there became and was liable to pay to the State Treasurer for the

use of the State for the excess so diverted an amount to be fixed by the State Water Supply Commission at the rate of not less than one dollar nor more than ten dollars per million gallons.

6. That by virtue of the provisions of an act entitled "An act to establish a Department of Conservation and Development, and to consolidate therein the State Water Supply Commission, the Board of Forest Park Reservation Commissioners, the State Geological Survey, the Washington Crossing Commission, the State Museum Commission and the Fort Nonsense Park Commission," approved April 8, 1915, the Board of Conservation and Development on the last mentioned date succeeded to and exercised and still exercises all the rights and powers, and performs all the duties theretofore exercised and performed by or conferred and charged upon the State Water Supply Commission.

7. That said Commission fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1909, the sum of $605.90.

8. That said Commission certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters, as aforesaid, to and including June 30, 1909 on the eighth day of February, 1910.

9. The State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer, on or before the first day of July, 1910, and still fails and neglects to make such payment as aforesaid.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July 1910, to the Attorney General the name of said defendant and the amount so due by it, for collection, and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $605.90, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1909.

*Second Count.*

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the first count are here repeated.

4. The average daily diversion of water by said municipality during the whole year ending June 30, 1910, was 17,404,705 gallons, said amount so diverted being 3,204,705 gallons in excess of the amount which said municipality was entitled to divert under
26 the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. That said Commission fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1910, the sum of $1,169.71.

8. That said Commission certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including June 30, 1910, on fourteenth day of February, 1911.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its indebtedness to the State.

10. That the sum specfied in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1911, and still fails and neglects to make such payment as aforesaid.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1910, to the Attorney General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $1,169.71, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1910.

27 *Third Count.*

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. That under the provisions of an act of the legislature of this State entitled "An Act to establish a State Water Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted," approved June 17, 1907, being Chapter 252 of the Session Laws of 1907, the defendant was permitted to divert from the Delaware River aforesaid, an average daily free allowance of water to the amount of 13,490,000 gallons, said last mentioned amount of water which was being diverted by said municipality on June 17th, aforesaid, the date when the act aforesaid became effective and operative.

4. The average daily diversion of water by said municipality during the whole year ending June 30, 1911, was 15,940,812 gallons, said amount so diverted being 2,450,812 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. That said Commission fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1911, the sum of $894.54.

8. That said Commission certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including June 30, 1911, on the thirteenth day of February, 1912.

28 9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1912, and still fails and neglects to make such payment as aforesaid.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1912, to the Attorney General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The Plaintiff demands of the defendant the sum of $894.54, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1911.

*Fourth Count.*

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole year ending June 30, 1912, was 17,530,374 gallons, said amount so diverted being 4,040,374 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are
29 here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. That said Commission fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1912, the sum of $1,474.73.

8. That said Commission certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including June 30, 1912, on the fifteenth day of February, 1913.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or be-

fore the first day of July, 1913, and still fails and neglects to make such payment as aforesaid.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1913, to the Attorney General the name of said defendant and the amount so due by it for collection, and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $1,474.73, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1912.

*Fifth Count.*

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole year ending June 30, 1913, was 17,753,010 gallons said amount so diverted being 4,263,010 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. That said Commission fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1913, the sum of $1,556.00.

8. That said Commission certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including June 30, 1913, on the fifteenth day of February, 1914.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1914, and still fails and neglects to make such payment as aforesaid.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1914, to the Attorney General the name of said defend-
31 ant and the amount so due by it, for collection, and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $1,556.00, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1913.

*Sixth Count.*

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole year ending June 30, 1914, was 19,461,287 gallons, said amount so diverted being 5,971,287 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. That said Commission fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1914, the sum of $2,179.52.

8. That said Commission certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including June 30, 1914, on the tenth day of February, 1915.

9. That the State Comptroller, as provided by law, there-
32 upon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1915, and still neglects and fails to make such payment as aforesaid.

12. That the State Comptroller, upon the failure of the defendant to make such payment as aforesaid, certified on the first day of July, 1915, to the Attorney General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $2,179.52, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1914.

*Seventh Count.*

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole year ending June 30, 1915, was 17,435,833 gallons, said amount so diverted being 3,945,833 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

33 6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1915, the sum of $1,440.23.

8. That said Board certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including June 30, 1915, on the seventh day of February, 1916.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1916, and still neglects and fails to make such payment as aforesaid.

12. That the State Comptroller, upon the failure of the defendant to make such payment as aforesaid, certified on the first day of July, 1916, to the Attorney General the name of said defendant and the amount so due by it for collection, and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $1,440.23, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1915.

*Eighth Count.*

1. The allegations of paragraph one of the first count are here repeated.

34 2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the six months ending December 31, 1915, was 15,636,666 gallons, said amount so diverted being 2,146,666 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the six months ending December 31, 1915, the sum of $394.99.

8. That said Board certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the

diversion of waters as aforesaid to and including December 31, 1915 on the eighth day of February, 1917.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1917.

12. That the State Comptroller, upon the failure of the defendant to make such payments as aforesaid, certified on the second
35 day of July, 1917, to the Attorney General the name of said defendant and the amount so due by it, for collection, and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $394.99, the amount due from the defendant to the plaintiff for the six months ending December 31, 1915.

*Ninth Count.*

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1916, was 15,730,833 gallons, said amount so diverted being 2,240,833 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole of the year ending December 31, 1916, the sum of $820.14.

8. The said Board certified the name of the Defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1916, on the eighth day of February, 1917.

36 9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1917.

12. That the State Comptroller, upon the failure of the defendant to make such payment as aforesaid, certified on the second day of July, 1917, to the Attorney General the name of said defendant and the amount so due by it, for collection, and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $820.14, the amount due from the defendant to the plaintiff for the whole of the year ending December 31, 1916.

*Tenth Count.*

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1917, was 16,423,000 gallons, said amount so diverted being 2,933,000 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

37 6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due

from said defendant for the whole of the year ending December 31, 1917, the sum of $1,070.54.

8. That said Board finally certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1917 on the fourteenth day of February, 1918.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1918.

12. That the State Comptroller, upon the failure of the defendant to make such payment as aforesaid, certified on the first day of July, 1918, to the Attorney General the name of said defendant and the amount so due by it for collection, and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $1,070.54, the amount due from the defendant to the plaintiff for the whole of the year ending December 31, 1917.

*Eleventh Count.*

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are
38 here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1918, was 18,444,167 gallons, said amount so diverted being 4,954,167 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so

due from said defendant for the whole of the year ending December 31, 1918, the sum of $1,808.27.

8. That said Board finally certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of water as aforesaid to and including December 31, 1918, on the thirteenth day of February, 1919.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1919.

12. That the State Comptroller, upon the failure of the defendant to make such payment as aforesaid, certified on the first day of July, 1919, to the Attorney General the name of said defendant and the amount so due by it, for collection, and it then and there
39 became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $1,808.27, the amount due from the defendant to the plaintiff for the whole of the year ending December 31, 1918.

*Twelfth Count.*

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1919, was 15,943,315 gallons, said amount so diverted being 2,453,315 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water

so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole of the year ending December 31, 1919, the sum of $895.46.

8. That said Board finally certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1919, on the fourteenth day of February, 1920.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1920.

12. That the State Comptroller, upon the failure of the defendant to make such payment as aforesaid, certified on the first day of July, 1920, to the Attorney General the name of said defendant and the amount so due by it, for collection, and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $895.46, the amount due from the defendant to the plaintiff for the whole of the year ending December 31, 1919.

The total sum demanded of the defendant by the pdaintiff is $14,310.03.

THOMAS F. McCRAN,
*Attorney General of New Jersey,*
*Attorney of Plaintiff.*

(Filed Feb. 14, 1921.)

The defendant, the City of Trenton, a municipal corporation of the State of New Jersey, says that:

*Answer to First Count.*

1. It admits the first paragraph.

2. It admits the second paragraph.

3. It denies the third paragraph.

4. It denies the fourth paragraph.

5. It denies the fifth paragraph.

6. It admits the sixth paragraph.

7. As to the statement contained in the seventh paragraph, that the said commission fixed the sum of $1.00 per million gallons as a

license fee to be paid by the defendant for water diverted by
41 it, the defendant has not any knowledge or information thereof sufficient to form a belief, and it denies the right of said commission to fix said sum charged against it, and that there is any sum due from the defendant to the plaintiff as alleged in said paragraph.

8. As to the statement in the eighth paragraph, defendant has not any knowledge or information thereof sufficient to form a belief, and therefore neither affirms nor denies the same, but leaves the plaintiff to make such proof thereof as it may deem proper.

9. It denies the ninth paragraph.

10. It denies the tenth paragraph.

11. It denies the eleventh paragraph.

12. As to the statement in the twelfth paragraph, defendant has not any knowledge or information thereof sufficient to form a belief, and therefore neither affirms nor denies the same, but leaves the plaintiff to make such proof thereof as it may deem proper.

*Answer to Second Count.*

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 2.

*Answer to Third Count.*

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 3.

*Answer to Fourth Count.*

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 4.

*Answer to Fifth Count.*

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 5.

42 *Answer to Sixth Count.*

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 6.

*Answer to Seventh Count.*

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 7.

*Answer to Eighth Count.*

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 8.

*Answer to Ninth Count.*

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 9.

*Answer to Tenth Count.*

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 10.

*Answer to Eleventh Count.*

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 11.

*Answer to Twelfth Count.*

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 12.

*Separate Defense to Each of the Twelve Counts of the Complaint.*

1. The defendant had and possessed the right to use and take all the water from the Delaware River that it required, without limitation as to quantity, and without the payment of any license fee for any part of the water so used and taken during the year or part thereof specified in each of the said twelve several counts of the complaint, which said right was acquired by the "Trenton Water Works" by grant direct from the State of New Jersey, March 24, 1852, and was acquired by the defendant by the duly authorized purchase of such right from the said the "Trenton Water
43 Works" in manner following:

(*a*) By an Act of the Legislature of the State of New Jersey entitled "An Act to incorporate the proprietors of the Trenton Water Works," passed February 29, 1804, James Ewing, Peter Gordon, Thomas M. Potter, Gershom Craft, Alexander Chambers, and their associates, were created a body politic and corporate by the name, style and title "The President and Directors of the Trenton Water Works" and were constituted and declared to be forever thereafter a body politic and corporate in fact and in name; and (among other things) they and their successors and assigns by the name and style aforesaid, were made capable of holding their capital stock, and of conducting, directing and disposing of the same from time to time, and of disposing of the use of water, to such as should apply for the same, for such annual rent and under such restrictions as they should think proper, and of purchasing, taking and holding, to them, their successors and assigns for the use of said corporation all such estates, real and personal, necessary or convenient for them, and of selling, disposing and conveying the same at their pleasure, and also to lay and extend their aqueduct through such of the streets of the said city as they should think necessary, and for that purpose to open and dig in such parts of said streets as should be convenient and necessary for the purposes aforesaid, as by reference to a copy of said act hereunto annexed, marked "*a*," and made a part hereof, will more fully and at large appear: (*b*) and by an Act of the Legislature of the State of New Jersey entitled "A supplement to an act entitled, 'An Act to incorporate the proprietors of the Trenton Water Works,' passed the 29th day of February, A. D. 1803,'" approved March 24, 1852, the "President and Directors of the Trenton Water Works," were (among other things) authorized and empowered to take the water which they then and thereafter required, without limitation as to quantity, either in whole or in part, from the Delaware River, for their corporate purposes, as by reference to a copy of said act hereunto annexed, marked "*b*," and made a part hereof, will more fully and at large appear: (*c*) and by an
44 Act of the Legislature of the State of New Jersey entitled "An Act to authorize and enable the City of Trenton to purchase a part or the whole of the capital stock of the Trenton Water Works Company" approved March 2, 1855, it was (among other things) made lawful for the common council of said City of Trenton, whenever it seemed to them expedient so to do, to purchase, in the name and on behalf of said City, the whole or a majority of the shares of the capital stock of the "President and Directors of the Trenton Water Works," and thereby to become possessed of the same rights and privileges, and be subject to the same liability, as other stockholders, provided, a majority of the electors of said city voting at an election therein specified voted for such purchase, as by reference to a copy of said act hereunto annexed, and marked "*c*," and made a part hereof, will more fully and at large appear: (*d*) an election was held on the fourth Monday of March, A. D. 1855, upon the question of making the purchase authorized by said act of March 2, 1855, and the following vote was cast, "For Water Works" 1,059 votes; "against water works," 201 votes; majority 858

votes; (*e*) at a meeting of the Common Council of said city held April 2, 1855, the President of that body laid before it the result of said election, as certified by the election officers of each ward of said city and it was made to appear that a majority of the electors of said city, voting at such election had voted for such purchase, and said act thereupon became immediately effective; (*f*) the City of Trenton purchased the whole of the capital stock of the "President and Directors of the Trenton Water Works" under the authority of said Act of March 2, 1855, and became the real owners of said works, and all the corporate rights, powers, franchises and privileges of the said the "President and Directors of the Trenton Water Works" prior to March 1, 1859; (*g*) and by an Act of the Legislature of the State of New Jersey entitled "An Act to authorize the 'President and Directors of the Trenton Water Works,' to convey their works and franchises to the city of Trenton, and to provide for the management of said Works,'" approved March 1,
45 1859, it was (among other things) made lawful for the "President and Directors of the Trenton Water Works," and they were required to convey unto "The Inhabitants of the City of Trenton," all the real estate, works and property and all the corporate rights, powers, franc-ises and privileges of said Company; and upon the due execution of such conveyance, the legal title to said estate, works and property, and all the corporate rights, powers, franchises and privileges of said Company passed to and vested in the "Inhabitants of the City of Trenton," by force of the statute, as reference to a copy of said act hereunto annexed, and marked "*d*," and made a part hereof, will more fully and at large appear; (*h*) and by a certain indenture made the 7th day of March, 1959, the "President and Directors of the Trenton Water Works," in consideration of the premises therein stated, and under and by virtue of the power and authority conferred upon them by the aforesaid act of the Legislature, granted, bargained, sold, aliened, released, assigned, conveyed and confirmed unto the "Inhabitants of the City of Trenton," their successors and assigns, all the lands, tenements, hereditaments and real estate, works and property, and all the corporate rights, powers, franchises and privileges of the said the "President and Directors of the Trenton Water Works," together with all and singular the appurtenances to the same belonging or in anywise appertaining; together with all the estate, right, title, interest, use, possession, property, claim and demand of them, of, in and to the same, and also all the corporate rights, powers, franchises and privileges granted unto the "Inhabitants of the City of Trenton," their successors and assigns to the only proper use, benefit and behoof of the said the "Inhabitants of the City of Trenton," their successors and assigns forever, according to the form, force and effect of the aforesaid act of the Legislature, as by reference to a copy of the said indenture hereunto annexed, and marked "*e*," and made a part hereof, will more fully and at large appear.

HENRY M. HARTMAN,
CHAS. E. BIRD,
*Attorneys and Counsel with Defendant.*

46 *"a." An Act to Incorporate the Proprietors of the Trenton Water Works.*

Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same:

1. That James Ewing, Peter Gordon, Thomas M. Potter, Gershom Craft, Alexander Chambers, and their present and future associates, proprietors of the Trenton Water Works, pursuant to a certain agreement, entered into by the said proprietors on the eighteenth day of September, one thusand eight hundred and two, their successors and assigns, be and they hereby are created a body politic and corporate by the name style and title of "The President and Directors of the Trenton Water Works," and they are hereby constituted and declared to be forever hereafter a body politic and corporate in fact and in name; and by that name they and their successors and assigns shall and may have perpetual succession, and shall be persons able and capable in law to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in all courts and places whatsoever; and that they, and their successors and assigns, may have and use a common seal and may make, change and alter the same at their pleasure; and also that they, and their successors and assigns, by the name and style aforesaid, shall be in law capable of holding their capital stock, and the increase and profits thereof, and of conducting, directing and disposing of the same, from time to time, in such manner and form as they shall think proper, and of disposing of the use of the water, to such as may apply for the same, for such annual rent and under such restrictions as they may think proper, and of purchasing, taking and holding, to them, their successors and assigns, for the use of the said corporation, all such estates, real and personal, as shall be necessary or convenient for them, and of selling, disposing and conveying of the same at their pleasure, and generally of making all such laws, rules and regulations for the better conducting the affairs of the said company, as they may, from time to time, find necessary or convenient;

47 provided, the same be not inconsistent with the constitution or laws of this state or of the United States.

2. And be it enacted, That James Ewing, who hath, according to the original agreement aforesaid, been chosen president, and Peter Gordon and Thomas M. Potter, who have, according to the said agreement, been chosen directors of the said company, shall be and continue to be president and directors of the said company until others shall be chosen in their stead, according to the provisions of their said agreement; and that all their legal acts and contracts entered into since and in virtue of their appointment, shall be good and valid as if this act of incorporation had then been in existence; and that it shall and may be lawful for the said president and directors, or for the president and directors for the time being, to lay and extend their acqueduct through such of the streets of the said city as they may think necessary, and, for that purpose, to open

and dig in such parts of the said streets as may be convenient and necessary for the purposes aforesaid; provided, always, that not more than four rods in any of the said streets shall be open at any one time, nor the same be kept open for more than six days; and that the same shall be filled up again at the expense of the company, and rendered as good and sufficient as if the same had not been taken up or removed.

Passed February 29th, 1804.

*"b." A Supplement to the Act Entitled "An Act to Incorporate the Proprietors of the Trenton Waters Works," Passed the Twenty-ninth Day of February, A. D. One Thousand Eight Hundred and Three.*

Whereas the president and directors of the Trenton water works have represented, that the increase of population in the city of Trenton has been so great, that the springs from which said company have heretofore supplied said city with water, are no longer adequate to furnish the necessary quantity—therefore,

1. Be it enacted by the Senate and General Assembly of the State of New Jersey, That the said The President and Di-
48 rectors of the Trenton Water Works, are hereby authorized and empowered to take the water which they may require, either in part or in whole, from the Delaware River, and, to that end, they are hereby invested with all the powers necessary to enable them to purchase and hold such real estate, and to construct, keep up, and maintain such reservoirs, aqueducts, and apparatus for elevating water, and such erections in the Delaware river, not obstructing the navigation thereof, and such other works, establishments, and fixtures, as may, in their opinion, be required to effectuate the objects of this act, and to lay all pipes under the streets or through private property, that may be needed to conduct said water from the river to their reservoirs, and from the reservoirs to such parts of the city and its vicinity as they may deem expedient.

2. And be it enacted, That if it shall become necessary, in the opinion of said president and directors, to lay pipes through any private lands in said city, or if any private lands shall be required for erecting reservoirs or other works thereon, and no agreement can be made with the owner or owners thereof, as to the amount of compensation to be paid for laying said pipes through said lands, or the price to be paid for said lands, as the case may be, by reason of the unwillingness of said owners, or any of them, to accept such compensation or price as said president and directors may deem reasonable, or by reason of the absence or legal incapacity of said owners, or any of them, it shall be the duty of either of the justices of the supreme court, upon application in writing of said president and directors, with a map of the lands through which it is deemed necessary to lay said pipes, or a map and description of the lands so needed for said reservoirs or other works, and after ten days' previous notice in writing of such application to the owner or owners of

said lands, to appoint three disinterested appraisers to determine the compensation to be paid for the laying of said pipes through said lands, or the price to be paid for said lands, as the case may be; and it shall be the duty of said appraisers, after having taken, before said justice, an oath or affirmation faithfully and impar-
49 tially to discharge the duties of their appointment, and after having carefully viewed the premises, within twenty days after their appointment, to deliver to said president and directors a written appraisement under the hands and seals of them, or a majority of them, of the award they may have made, which map, description, and award the said president and directors shall cause to be recorded in the registry of deeds for the county of Mercer, and upon payment or tender, by or on behalf of the said president and directors, to such owner or owners as aforesaid, or some one of them, of the sum awarded in such appraisement, if any, then the said president and directors shall have the right to lay said pipes through the lands aforesaid, or shall be deemed seized in fee simple of the lands so required for the erection of said reservoirs or other works as aforesaid; and in case any owner or owners of such lands shall be feme covert, under age, non compos mentis, or out of the state, then and in that case it shall be sufficient for said president and directors to pay the amount of said appraisement into the court of chancery, subject to the order of said court, for the use of the party or parties entitled to the same, the cost of all which proceedings shall be taxed by the said justice of the supreme court, and paid by said president and directors.

3. And be it enacted, That in case the said president and directors, or the owner or owners of the said land, shall be dissatisfied with the award of the appraisers provided for in the preceding section, and shall apply to the supreme court, at the next term after filing said award, the court shall have power, upon good cause shown, to set the same aside, and thereupon to direct a proper issue for the trial of the said controversy to be formed between the said parties, and to order a jury to be struck, and a view of the premises to be had, and the said issue to be tried at the next circuit court to be holden in the county of Mercer, upon the like notice and in the same manner as other issues in the said court are tried; and it shall be the duty of the said jury to assess the value of the said land or damages sustained; and if they shall find the same or a greater sum
50 than the said appraisers shall have awarded in favor of the said owner or owners, then judgment therefor, with costs, shall be entered against said company, and execution awarded therefor; but if the said jury shall be applied for by the said owner or owners, and shall find the same or a less sum than the said president and directors may have offered or the said appraisers awarded, then the said costs to be paid by said applicant or applicants, and either deducted out of the said sum found by the said jury, or execution awarded therefor, as the said court shall direct; but such application shall not prevent the company from taking or laying pipes through said lands upon the award of the appraisers; the value or

damages being first paid, or upon a refusal to receive the same, upon a tender thereof, or the owner or owners thereof being under any legal disability, the same being first paid into the court of chancery.

4. And be it enacted, That whenever it shall become necessary to make any repairs or alterations in any pipes which may have been laid through any private lands, either by virtue of the preceding section or by agreement with the owner or owners thereof, it shall be lawful for said president and directors, with their workmen and agents, and with necessary vehicles, tools, and implements, to enter upon said lands, and make the necessary repairs and alterations, doing no unnecessary damage; but nothing herein shall be so construed as to protect the said president and directors, or their workmen or agents, from any action that may be brought against them, individually, by the owner or owners, occupant or occupants, of said lands, for any damage which they may have wilfully or unnecessarily done.

5. And be it enacted, that the rents for the use of the water which said company may supply, shall draw interest from the time they become due.

6. And be it enacted, That if any person shall wilfully pollute or adulterate the water in any reservoir belonging to said company, he or she, so offending, shall be deemed guilty of a misde-
51 meanor, and, on conviction thereof, shall be punished by fine, not exceeding five hundred dollars, or by imprisonment at hard labor, not exceeding three years, or both, at the discretion of the court before whom such conviction may be had.

7. And be it enacted, That the said the President and Directors of the Trenton Water Works shall continue to have and possess all the rights, powers, franchises, and privileges which they now have and possess by virtue of the act to which this is a supplement or the agreement referred to in said act, or act entitled, "An Act to authorize Stephen Scales to convey the water from his spring, through the several streets of the city of Trenton," passed the third day of December, A. D. one thousand eight hundred and one; and that said rights, powers, franchises, and privileges shall be deemed to be enlarged, so as to embrace the rights, powers, franchises, and privileges given to said corporation by this act, to all intents and purposes as if the same had been conferred on said company at the time it was first established.

8. And be it enacted, That the capital stock of said company shall be deemed to be twenty thousand dollars, divided into shares of fifty dollars each, as fixed by the stockholders thereof, at a meeting held on the tenth day of June, A. D., one thousand eight hundred and thirty-nine; and that the stockholders of said company may, from time to time, increase said capital stock to any sum not exceeding one hundred thousand dollars, in order to carry into effect the objects of this act.

Approved March 24, 1852.

*"c." An Act to Authorize and Enable the City of Trenton to Purchase a Part or the Whole of the Capital Stock of the Trenton Water Works Company.*

Whereas, it has been represented to the legislature that in order to secure to the city of Trenton a supply of water adequate for the extinguishment of fires and other public purposes, it is expedient that the said city should be the owner of the whole, or a majority,
52 of the stock of the Trenton Water Works—therefore

1. Be it enacted by the Senate and General Assembly of the State of New Jersey, That it shall be lawful for the common council of the city of Trenton, whenever it may seem to them expedient so to do, to purchase, in the name and on the behalf of the said city, the whole, or a majority, of the shares of the capital stock of the president and directors of the Trenton Water Works, and thereby to become possessed of the same rights and privileges, and be subject to the same liabilities, as other stockholders; and to the end aforesaid, the said common council are hereby authorized and empowered to contract such debts and to borrow such sums of money, on the credit of the said city, as shall appear to them to be necessary, not exceeding one hundred thousand dollars.

2. And be it enacted, That in case the said common council shall make the said purchase, they shall have the right to vote on the said shares of stock, or any of them, by proxy, and shall be entitled to appoint as many directors of said water works as the shares held by the city shall be in proportion to the whole number of shares of said water works; provided, that no member of said common council shall be appointed such director.

3. And be it enacted, That the said common council are hereby empowered to set off such parts of the said city, through which the water pipes of the Trenton Water Works now are or hereafter shall be laid, into a district or districts, to be called "the Water District or Districts" and to alter the boundaries thereof, as occasion may require; and to impose an annual tax, in such an amount as to them may seem expedient, on all improved lands comprised in said water district or districts, the owners or occupants of which shall not take the water for the use thereof from the said president and directors of the Trenton Water Works, the said tax to be assessed with a view to the value of the property taxed and to, its rental, and said assessment to be made and collected in such manner, at such times, and by such person or persons, as the said common council shall from time to time, by ordinance, direct; and that said taxes,
53 when imposed in the manner aforesaid, shall have the same force and effect, and be collectable by the same process as other city taxes; and that the money raised by said tax shall be appropriated to defraying the expense of supplying the said city with water for the extinguishment of fires and other public uses.

4. And be it enacted, That if the said city shall purchase any of the said stock, it shall be obligatory on the said city to purchase the shares of any stockholder who may offer to sell the same at its par value within one year from the passage of this act, and to receive in payment therefor the bonds of the city, hereinafter mentioned, or cash, at the option of the city; and in case the common council shall neglect or refuse to purchase any stock offered to the city on the terms aforesaid, for the space of thirty days after such offer shall be made in writing to the city treasurer, then "the Inhabitants of the City of Trenton" shall be and they are hereby made liable to pay to the person or persons so offering such stock the par value thereof, with interest from the date of such offer, to be recovered in an action on the case, with costs, in any court having jurisdiction of the same; provided, that no execution shall be issued upon the judgment recovered in any such action, until the person or persons obtaining the same shall transfer to the city the stock for the value of which such judgment shall be rendered.

5. And be it enacted, That the loan authorized by the first section of this act shall be called the water loan; and to secure the payment thereof, the said common council are hereby authorized to issue the bonds of the city for an amount not exceeding in the whole the sum of one hundred thousand dollars, which bonds shall bear interest at the rate of six per cent per annum, payable semi-annually, and shall not be subject or liable to any tax which may be hereafter levied or assessed by order of the common council of said city.

6. And be it enacted, That none of said bonds shall be sold or disposed of at less than their par value; and the proceeds thereof
54 shall be applied, exclusively, to the purposes contemplated by this act, and to no other purpose whatever.

7. And be it enacted, That the stock purchased shall be transferred to the said city, and the dividends and revenue derived therefrom shall be appropriated, first, to the payment of the interest of the bonds issued for the purchase of said stock, and the balance thereof shall be set apart as a sinking fund for the payment of the principal of said bonds; and that no part of said dividends or revenue shall be appropriated or used for any other purpose whatever; and no part of said stock shall be sold or transferred until the payment of the principal and interest of said bonds.

8. And be it enacted, That an election by ballot shall be held, on the fourth Monday in March next, in each of the wards of said city, at the places of holding the last annual election at which election the electors of said city shall vote upon the question of making the purchase authorized by this act, those in favor of making said purchase depositing ballots with the words "For Water Works," written or printed thereon, and those opposed thereto depositing ballots with the words "Against Water Works" written or printed thereon; the poll of such election shall be opened at seven o'clock in

the forenoon, and kept open till seven o'clock in the afternoon; and the said election shall be conducted in the same manner and by the same officers as the annual city election; and in cases of vacancy from any cause, such vacancy shall be filled by the electors of the ward in which the same may arise before the opening of the poll; after counting off the votes polled, the result of said election, in each ward, shall be certified by the election officers of each ward, to the president of common council, to be by him laid before the common council at their next meeting; and if it shall appear that a majority of the electors of said city, voting at such election, have voted for such purchase, then this act shall take effect immediately, but if otherwise, then this act shall be void.

Approved March 2, 1855.

55 *"d." An Act to Authorize "the President and Directors of the Trenton Water Works" to Convey Their Works and Franchises to the City of Trenton and to Provide for the Management of said Works.*

Whereas, the inhabitants of the city of Trenton, have purchased the whole of the capital stock of "The President and Directors of the Trenton Water Works," and have thus become the real owners of said works, but are compelled to manage and conduct the same pursuant to the provisions of the charter of said company, in whom the legal title to said work is still vested, therefore

1. Be it enacted by the Senate and General Assembly of the State of New Jersey, That it shall be lawful for "The President and Directors of the Trenton Water Works," and they are hereby required on or before the first day of May next, to convey unto "the inhabitants of the city of Trenton" all the real estate, works, and property, and all the corporate rights, powers, franchises, and privileges of said company; and that upon the due execution of such conveyance, the legal title to said real estate, works and property, and all the corporate rights, powers, franchises and privileges of said company shall pass, to and vest in "the inhabitants of the city of Trenton," in as full and ample a manner as the same now are or heretofore have been held and enjoyed by the said company.

2. And be it enacted, That the said water works shall be conducted and managed exclusively by and through a board of commissioners to be appointed as hereinafter directed, and that all the authority, powers and duties relative thereto now exercised and performed by the president and directors of said company shall be exercised and performed by said commissioners, except as is hereinafter provided; and in pursuance of this authority the said commissioners may appoint and employ all proper clerks, officers, agents and assistants necessary or convenient for the purposes aforesaid at such compensation as they may deem reasonable; provided, that the said commissioners shall have no power or authority to create
56 loans or borrow money, and shall not be entitled to take or receive any compensation for their services.

3. And be it enacted, That the real estate, works and property hereby authorized to be conveyed to the inhabitants of the city of Trenton, and the income thereof shall be and remain liable in their hands for the payment of all debts heretofore contracted by the president and directors of the Trenton Water Works; and that for the purpose of paying such debts and to provide for the further extension of said water works, it shall and may be lawful for the common council of said city, upon the written application of said commissioners, to issue the bonds of the city for an amount not exceeding in the whole the sum of fifteen thousand dollars, which bonds shall not be disposed of at less than par value, and shall bear interest at the rate of six per cent per annum, payable semi-annually, and shall not be subject or liable to any tax which may be levied or assessed by order of the common council of said city; provided, that such bonds shall not be issued in any case except a majority of the whole number of said council shall concur therein.

4. And be it enacted, That the said bonds or the proceeds thereof, when sold by the said commissioners, shall be applied first, to the payment of the debts of the president and directors of the Trenton Water Works, and the balance, if any, shall constitute a fund for the future extension of said works, and shall be used exclusively for that purpose, and no other.

5. And be it enacted, That the net rents and revenue received from the said water works, after paying all expenses for maintaining the works and extending the pipes, and paying salaries, wages and incidental expenses, shall be appropriated, first to the payment of the interest on the bonds heretofore issued for the purchase of the stock of said company, called the "water loan," and also on the bonds issued pursuant to the provisions of this act, which shall be deemed part of said loan, and the balance thereof shall be set apart as a sinking fund for the payment of the principal of said bonds;
57 and that no part of said rents and revenues shall be appropriated or used for any other purpose whatever until the whole of said debt is paid and satisfied; provided, that the said commissioners shall not expend out of said water rents in any one year more than five hundred dollars for extending the pipes, and all extensions shall be charged to construction account, and they shall not make any such extension or improvement (necessary repairs excepted), the cost of which shall exceed said amount, in any one year, unless the common council shall have previously authorized the issue of city bonds for the purpose of paying therefor.

6. And be it enacted, That the said commissioners shall, on the last Monday of April, and on the last Monday of October in each year, pay over to the treasurer of the city of Trenton so much of the net rents and revenue of said works for the preceding six months, as will be sufficient to pay the semi-annual interest on the bonds mentioned in the last preceding section; and shall on the same days pay over the surplus, if any, to the "Commissioners of the Sinking Fund" of said city, to be by him safely invested in the same manner that

other city moneys are invested by him, and allowed to accumulate as a sinking fund for the payment of said bonds at maturity.

7. And be it enacted, That until such time as the net rents and revenue of said works shall be fully sufficient to pay the interest of said water loan, it shall be the duty of said commissioners in the month of April in each and every year, to certify to the common council of said city what in their opinion will be the net revenue of said works for the ensuing year applicable to the payment of said interest; and thereupon the said common council may impose, assess, and collect such an amount of tax as shall be sufficient, with the estimated net revenue of said works, to pay the interest on said water loan for that year; and the said common council are hereby empowered to add to the amount they now are or hereby may be authorized to raise in the general assessment, such sum as shall be necessary for the purpose aforesaid, notwithstanding any
58 limitation or restriction contained in the charter of said city, or the supplement thereto.

8. And be it enacted, That the city treasurer shall keep a separate account of all moneys received and paid by him on account of the interest of said water loan, particularly specifying therein the amounts received semi-annually from the water commissioners, as also the amount raised by taxation for the purpose of paying said interest, the whole of which shall be credited in said account and applied exclusively to the purpose aforesaid.

9. And be it enacted, That a majority of said commissioners shall constitute a quorum for the transaction of business, and they shall keep regular books of account, and books for recording the whole of their official proceedings, and all such books shall be open at all times to the examination of any member of the common council of the city of Trenton, and of any person or persons appointed by said common council for that purpose; the said commissioners shall also, on the first Monday in February of every year, make a report to the said common council of the condition of the said water works, accompanied by a detailed statement of their receipts and expenditures on account of the same, an abstract of which shall be published with the annual statement of the city treasurer.

10. And be it enacted, That all the contracts and engagements, acts and doings of the said commissioners within the scope of their duty or authority, shall be obligatory upon, and be in law considered as done by the inhabitants of the city of Trenton, and any judgment recovered against the said commissioners in their official capacity, as provided in the next succeeding section, shall have the same force and effect as a judgment against the city, and shall be enforced by the same process and in the same manner as if the same had been rendered in an action brought against "the inhabitants of the city of Trenton."

11. And be it enacted, That the said commissioners may sue and be sued, and prosecute or defend any action or process at law or in

equity, by the name of "the Water Commissioners of the City
59 of Trenton," against any person or persons for money due for the use of the water, for the breach of any contract, express, or implied, touching the execution or management of the works, or the distribution of the water, or of any promise or contract made to or with them, and also for any injury, trespass, or nuisance done or suffered to the water, reservoirs, pipes, machinery, or any apparatus belonging to or connected with any part of the works, or for any improper use or waste of the water; and any vacancy or the filling of any vacancy in the board of commissioners, either before or after any cause of action arises or suit is commenced, shall not change the right of said commissioners as a body to commerce, maintain, or defend such action or suit, but for such purposes and in such cases they shall be considered from the time of the organization of the board as a body corporate.

12. And be it enacted, That all promises and contracts made by or with the president and directors of the Trenton Water works previous to the execution of the conveyance hereinbefore authorized, shall be binding on the said commissioners and upon the other contracting party in the same manner and to the same extent as if said promise or contract had originally been made by or with the said commissioners; and that all actions, suits, and remedies relative thereto shall be brought, prosecuted and enforced in the manner specified in the last preceding section in as full and ample a manner as the same might or could have been prosecuted and enforced by or against the president and directors of the Trenton water works in case this act had not been passed.

13. And be it enacted, That the board of commissioners for the time-being shall have power and authority to regulate the supply and use of the water, to fix the prices for the same and the times of payment, to make and prescribe such rules, regulations, conditions, and restrictions as they may deem necessary or expedient with reference to the use and mode of drawing the water, the collection of water rents, and the mode of enforcing such collection; and they shall
60 have power to impose such penalties in addition to cutting off the water as they may deem expedient, for the violation of such rules, regulations and restrictions.

14. And be it enacted, That it shall be the duty of said commissioners to erect and maintain fire plugs in the public streets of said city, through which water pipes shall have been laid in such number and locations as the common council may from time to time direct, and to supply the same with water; and such plugs shall be under the control and direction of the common council, who are hereby authorized by ordinance to make the necessary rules and regulations respecting the use thereof, and to prescribe penalties for their violation and the mode of collecting such penalties.

15. And be it enacted, That the said commissioners shall elect annually one of their number to be president of the board, who shall,

under their direction, have their general superintendance of the water works and the business of the board; the president, or in his absence, one of the commissioners appointed by the board for that purpose, shall sign all contracts and all orders on the treasurer for the payment of moneys which may be authorized by the said commissioners.

16. And be it enacted, That the said commissioners shall require and take from their treasurer and such officers and agents as they may appoint, such bonds and securities for the faithful performance of their duties as they may deem proper.

17. And be it enacted, That Charles Moore, Philemon Dickinson, Daniel Loder, David S. Anderson, Jacob M. Taylor, and Albert J. Whitaker, shall constitute the first board of water commissioners, and shall at their first meeting determine, by lot or otherwise, the terms during which they shall hold their offices; and these shall be as follows: two of them shall remain in office one year, two of them two years, and two of them three years; all to be computed from the first day of July next.

18. And be it enacted, That the common council of said city shall in the month of June, at their regular monthly meeting, in
61 the year eighteen hundred and sixty, and in the same month in every year thereafter, elect two commissioners, who shall hold their office for three years, to be computed from the first day of July next ensuing their election; and any vacancy that may occur in said commission, by death, resignation, or otherwise, shall be filled by the common council at a regular monthly meeting, but the person appointed to fill such vacancy shall hold his office only for the residue of the term for which he may be appointed; provided, that no member of common council shall be appointed a water commissioner, or act as such after his election as a member of said council.

19. And be it enacted, That all acts or parts of acts, conflicting with this act, be, and the same are hereby repealed.

20. And be it enacted, That this act shall take effect immediately.

Approved March 1, 1859.

"*e.*" This indenture, made this seventh day of March, in the year of our Lord one thousand eight hundred and fifty-nine, between "The President and Directors of the Trenton Water works" party of the first part, and "The Inhabitants of the City of Trenton," party of the second part: Whereas, in and by an act of the Legislature of the State of New Jersey entitled "An Act to authorize the President and Directors of the Trenton Water Works to convey their works and franchises to the city of Trenton, and to provide for the management of said works," after reciting that "Whereas, 'The Inhabitants of the City of Trenton' have purchased the whole of the capital stock of 'The President and Directors of the Trenton Water Works', and have thus become the real owners of said works, but are compelled to manage and conduct the same pursuant to the provisions of

the charter of said company, in whom the legal title to said works is still 'vested', it was, among other things, enacted as follows, that is to say: 'Be it enacted by the Senate and General Assembly of the State of New Jersey, That it shall be lawful for 'The President and Directors of the Trenton Water Works' and they are hereby
62 required, on or before the first day of May next, to convey unto 'The Inhabitants of the City of Trenton' all the real estate, works and property, and all the corporate rights, powers, franchises and privileges of said company; and that, upon the due execution of such conveyance, the legal title to said real estate, works and property, and all the corporate rights, powers, franchises and privileges of said company shall pass to and vest in 'The Inhabitants of the City of Trenton', in as full and ample a manner as the same now are or heretofore have been held and enjoyed by the said company;" as in and by the said act of the Legislature, reference being thereunto had, will more fully and at large appear.

Now this indenture witnesseth, that the said "The President and Directors of the Trenton Water Works," in consideration of the premises, and under and by virtue of the power and authority conferred upon them by the aforesaid act of the Legislature, have granted, bargained, sold, aliened, released, assigned, conveyed and confirmed, and by these presents do give, grant, bargain, sell, assign, alien, release, convey and confirm unto "The Inhabitants of the City of Trenton," their successors and assigns, all the lands, tenements, hereditaments and real estate, works and property, and all the corporate rights, powers, frnachises and privileges of the said "The President and Directors of the Trenton Water Works" together with all and singular the appurtenances to the same belonging or in anywise appertaining; and also all the estate, right, title, interest, use, possession, property, claim and demand of them, the said party of the first part, of, in and to the same; to have and to hold the said lands, tenements, hereditaments and real estate, works and property, and also all the corporate rights, powers, franchises and privileges hereby granted unto the said "The Inhabitants of the City of Trenton," their successors and assigns, to the only proper use, benefit, and behoof of the said "Inhabitants of the City of Trenton," their successors and assigns, forever, according to the form, force and effect of the aforesaid act of the Legislature.

In Witness Whereof, "The President and directors of the
63 Trenton Water Works" have, by the hands of Charles Moore, their President, thereunto duly authorized by a resolution of the Directors of the said company, hereunto set their common seal, and the said President hath subscribed his name, the day and year first above written.

CHARLES MOORE, [SEAL.]
*President.*

The foregoing deed was signed, sealed and delivered, by order of the Board of Directors, on the day of the date thereof, in the presence of J. B. Quigley.

STATE OF NEW JERSEY, *ss:*

Be it known, that on the seventh day of March, A. D. eighteen hundred and fifty-nine, before me, Caleb S. Green, a Master in Chancery of said State, personally appeared John B. Quigley, who, being duly sworn according to law, did depose and say that he knows the seal of "The President and Directors of the Trenton Water Works" that the seal annexed to the foregoing deed is the common seal of "The President and Directors of the Trenton Water Works;" that Charles Moore, the President of the said corporation, did, by their order, sign, seal and deliver the said indenture as the voluntary act and deed of the said corporation, in the presence of said deponent; and that deponent did, at the execution thereof, subscribe his name as a witness thereto.

CALEB S. GREEN, *M. C. C.*

Recorded March 16th, 1859.
(Filed Apr. 27, 1921.)

64 This matter being opened to the court by Chas. E. Bird, of counsel with the defendant, in the presence of William Newcorn, Assistant Attorney General, of counsel with the plaintiff, and application being made to amend the amended answer filed in this cause, with the consent of the Attorney General, and the court having considered said application, and being of the opinion that such amendment should be allowed, it is on this 26th day of May, 1921, ordered that the amended answer filed in this cause, as aforesaid, be and the same is hereby amended by adding thereto the following separate defenses:

*Second Separate Defense to Each of the Twelve Counts of the Complaint.*

1. The defendant repeats the statements in the first separate defense and says that Sec. 8 of the act of June 17, 1907, being Chapter 252 of the Laws of 1907 impairs the obligation of a contract and offends against Art. I, Sec. 10, par. 1 of the constitution of the United States, and Art. IV, Sec. 7, par. 3 of the constitution of the State of New Jersey.

*Third Separate Defense to Each of the Twelve Counts of the Complaint.*

1. The defendant says that Sec. 8 of the act of June 17, 1907, being Chapter 252 of the Laws of 1907, imposes a tax upon property, without regard to uniformity and value, and offends against Art. IV, Sec. 7, par. 12 of the constitution of the State of New Jersey.

THOMAS W. TRENCHARD, *J. S. C.*

(Filed May 26, 1921.)

Application being made to the court by counsel for defendant for leave to amend the first separate defense interposed by defendant in

the amended answer filed in the above entitled cause, and counsel for plaintiff having consented thereto, and the making of said amendment not affecting or altering the issue raised by plaintiff's motion to "strike" out said defense, or the judgment of the court thereon, it is, on this 28th day of June, 1921, hereby ordered, on motion of counsel for defendant, that defendant have leave to
65 amend the original amended answer filed in this cause by inserting on page 3, line 1, after the word "defendant" and before the word "had" in the first separate defense, the following words and punctuation: "required all the water used and taken for its corporate purposes, and"

THOMAS W. TRENCHARD, *J. S. C.*

I hereby consent to the making and entering of this order.

THOMAS F. McCRAN,
*Atty. Gen.;*
WILLIAM NEWCORN,
*Asst. Atty. Gen.,*
*Counsel for Plaintiff.*

(Filed Jul. 7, 1921.)

To the Within Named Defendant or Henry M. Hartmann and Charles E. Bird, its Attorneys:

Please take notice that on Thursday, the twenty-sixth day of May, instant, at the hour of ten thirty o'clock in the forenoon, daylight saving time, or as soon thereafter as counsel can be heard, before his Honor, Thomas W. Trenchard, Justice of the Supreme Court, at the State House, in the City of Trenton, a motion will be made to determine the question of law raised in the defense of the defendant in the above entitled action; and at such time and place I shall move to strike out the three separate defenses to each of the twelve counts of the complaint, on the ground that the same do not disclose a legal defense to the complaint, in that Chapter 252 of the Laws of 1907, entitled "An Act to establish a State Water-Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted," approved June 17, 1907, requires pavement for diversion of water in excess of the amount fixed by said statute, and that the construction of said statute, as contended for by the defendant, would render the same inefficacious.

That the rights of the defendant are not protected, conserved or sustained by Chapter 252 of the Laws of 1907.

That the provisions of Chapter 252 of the Laws of 1907 do not bar the plaintiff from recovery.

66 Yours respectfully,

THOMAS F. McCRAN,
*Attorney General of New Jersey.*
WILLIAM NEWCORN,
*Assistant Attorney General.*

Dated May 12, 1921.
(Filed May 26, 1921.)

Application having been made on behalf of the plaintiff, and on due notice to the defendant, to determine the questions of law raised in the answer and defenses of the defendant, in the above entitled action, and to strike out the three separate defenses, interposed by the defendant to each of the twelve counts of the complaint, as recited in said notice, on the ground that the same did not disclose a legal defense to the complaint, and the court having heard the argument of counsel for the plaintiff and of counsel for the defendant thereon, and the court being of the opinion that the three separate defenses so interposed, as aforesaid, should be struck out;

It is ordered that the said three separate defenses, so interposed, should be struck out.

Let this order be entered in the minutes.

THOMAS W. TRENCHARD,
*Justice of the Supreme Court.*

Dated May 27th, 1921.

On motion of
THOMAS F. McCRAN,
*Attorney General,*
*Attorney of Plaintiff.*

(Filed Jun. 9, 1921.)

This case was tried before Judge Frank T. Lloyd, without a jury, by consent of both of the parties thereto, at the Mercer Circuit, on June fourteenth, one thousand nine hundred and twenty-one.

Counsel for the Defendant, upon the case being moved, consented to the entry of a judgment against the Defendant for the sum of fourteen thousand three hundred ten dollars, ($14,310) if
67 any sum was found to be due.

The court finds for the Plaintiff and against the Defendant for the sum of fourteen thousand three hundred ten dollars, ($14,310).

Whereupon it is adjudged that the plaintiff, State of New Jersey do recover of the said defendant City of Trenton, the sum of fourteen thousand three hundred ten dollars damages and its costs which have been taxed at the sum of — dollars, making in the whole the sum of —.

$14,310.00.

Judgment entered July 26, 1921.
WM. S. GUMMERE, *C. J.*

68 I, Enoch L. Johnson, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this tenth day of August A. D. nineteen hundred and twenty-one.

[SEAL.] ENOCH L. JOHNSON,
*Clerk.*

69 New Jersey Supreme Court.

STATE OF NEW JERSEY, Plaintiff-Appellee,

vs.

CITY OF TRENTON, Defendant-Appellant.

On Appeal.

Remittitur.

It appearing by the remittitur now here returned from the Court of Errors and Appeals that the Judgment of this Court removed by appeal in the above entitled cause, was in and by said Court of Errors and Appeals, affirmed, with costs,

It is Ordered that said remittitur be filed and that said cause be proceeded with according to law.

Entered March 23, 1922,

On motion of

WILLIAM NEWCORN,
*Assistant Attorney General,*
*Counsel of Appellee.*

70 New Jersey Court of Errors and Appeals.

Nos. 85-86, November Term, 1921.

STATE OF NEW JERSEY

vs.

THE CITY OF TRENTON.

THE STATE OF NEW JERSEY

vs.

THE CITY OF NEWARK.

Argued November Term, 1921; Decided March Term, 1922.

Thomas F. McCran,
Attorney General;
William Newcorn,
Asst. Attorney General,
For the State.
Charles E. Bird,
For City of Trenton.
Jerome T. Congleton,
Joseph G. Wolber,
For City of Newark.
Robert H. McCarter,
Counsel for defendants.

The opinion of the court was delivered by

MINTURN, *J.*:

For many years, the Cities of Trenton and Newark had been obtaining their water supply from the Delaware and Pequannock water sheds, respectively, under various legislative grants for that purpose. An act general in its scope, designed by the legislature for that specific purpose, and evidencing a liberal legislative public
71 policy was passed in 1888, entitled "An act to authorize any of the municipal corporations of this State to contract for a supply, or a further or other supply of water therefor," (Chap. 250 L. 1888).

In that situation the legislature passed Chapter 252 of the Laws of 1907, entitled "An act to establish a Water Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted." These two enactments serve to mark the parting of the ways between the legislative conception of the old order, and the new; between a public policy which left the appropriation of the public domain to the haphazard necessities of sporadic local interests, and a State wide policy of conservation and distribution.

Under the provisions of the act of 1907, a commission was appointed by the Governor, charged with supervision over all the sources of potable and public water supply, "to the end that the same may be economically and prudently developed for the use of the people of the State."

In furtherance of that general policy, the second section of the act inhibits any municipal corporation or others engaged in purveying water or "proposing to supply the inhabitants of any municipal corporation with water," from condemning lands or water, "for any new or additional source of water supply, or to divert water from such new or additional source, until such municipal corporation or person has first submitted descriptions thereof, which may be accompanied by maps and plans to said Commission, and until said Commission shall have approved the same."

To this legislative mandate is super-added, a proviso that the act shall not affect water works already in process of construction, provided the plans of construction be submitted within ninety days after the approval of the act; and the section concludes with this significant provision: "Nothing in this act contained shall be con-
72 strued to take from any municipality in this State the right to use and take all the water which it has the right to use or appropriate by purchase or condemnation."

This provision of course must be read in conjunction with the other provisions, as well as the title of the act, which evince a general legislative policy of imposing a license fee for the use of water in future; of conserving its use and of dealing with "new or additional sources of water supply," upon a regulative basis.

In consonance with this general legislative conception, the eighth section of the act provides, "Every municipality, corporation or private person, now diverting the waters of streams or lakes with outlets, for the purpose of a public water supply, shall make annual payments on the first day of May, to the State Treasurer, for all such water hereafter diverted in excess of the amount now being legally diverted; provided, however, no payment shall be required until such legal diversion shall exceed a total amount equal to one hundred gallons daily per capita, for each inhabitant of the municipality or municipalities supplied, as shown by the census of 1905. Such payment shall be deemed to be a license and its amount shall be fixed by said commission, at a rate of not less than one dollar or more than ten dollars per million gallons." In default of payment of the fee to the State Treasurer, of the aggregate amounts collectible, the State Comptroller is directed to collect the same; and in case of failure to collect, he is directed to certify the amounts due to the Attorney General, for collection, who is thereby authorized "to take immediate steps to collect the same in the name of the State." Such departmental action having been taken in the cases of these two municipalities, the Attorney General instituted the necessary actions in the Supreme Court, and obtained judgments thereon.

The City of Trenton interposed three distinct defences, and the City of Newark interposed but one, the substance of which was
73 a denial of the State's power to exact the fee. On motion

these defences were struck out following the determination of this Court in State v. Jersey City, 94 L. 431, 111 Atl. 544, upon the ground that the answers contained no legal defence to the action. From that judicial action this appeal has been taken.

The facts are not in dispute. It is conceded that the City of Trenton at the time of the enactment of the act of 1907 was taking from the Delaware River daily 14,200,000 gallons of water for local use, and that the City of Newark was daily extracting from the Pequannock River 36,241,666 gallons for local use.

These diversions represent the ante-statutory flowage, and are considered by the State under the 8th section of the act of 1907 to be non-taxable. No dispute exists as to the quantum of water extracted, or as to the amount due therefor, if the essential proposition involving the legal right of the State to impose the license fee be legally vindicated.

The defendants in effect deny the power of the State to interfere with their present contractual status, as an interference with vested rights acquired by them as proprietary owners, and not as political sub-divisions of the State. Thus their brief declares "It is difficult to comprehend how in view of the foregoing cases, it can be claimed that the state has not to the extent here claimed, denuded itself of any right in, or dominion over the waters which are the subject matter of these suits"; and again, "Any diminution of the right conveyed is a taking thereof in derogation of the grant, and to that extent the act of 1907 is unconstitutional."

This contention presents a misconception, as in no sense does the act in question contemplate a deprivation of an existing contractual or property right, but on the contrary, it expressly assumes the right of these defendants to extract water from their respective sources of supply, and impose no tax thereon. It also assumes their right to continue to extract water from such sources as the de-
74 mands of their populations, and local exigencies may require.

The effect of this legislative policy therefore is, that nothing is taken from them in the way of property right, or freedom of future action, in the execution of the powers conferred upon them.

Such in effect was the construction put upon the act by Mr. Justice Bergen, speaking for the Supreme Court, in East Jersey Water Co. v. Board of Conservation, etc., 91 L., 448.

The legislature assumed the right of the defendants to extract water free of a license fee, upon a basis practically of present consumption; and thereafter and beyond that limitation, it placed them and all future purveyors of water upon the same basis, by the requirement of a license fee. This situation simply presents the inquiry whether the State may exert its police power for the purpose of conserving the public property, in the interest of the common weal; for as was remarked by Mr. Justice Pitney, speaking for this Court in McCarter, Atty. Genl. vs. Hudson County Water Ct. 70 Eq. 695, and substantially repeated by Mr. Justice Holmes, in the same case in 209 U. S. 349, "the regulation of the use and disposal of

such water, therefore, if it be within the powers of the State, is among the most important objects of government." Such was the legislative purpose, as we conceive it, in the provisions of the act of 1907,—a regulation of the use, by the interposition of the police power, in the interest of conservation and development. The fact that in the exercise of this power, men and corporations may be hampered and inconvenienced in the use or employment of their properties, presents no legal or constitutional barrier to its enforcement.

Slaughter House Cases, 16 Wall U. S. 36.
Mugler v. Kansas, 123 U. S. 623.
Reetz v. Michigan, 188 U. S. 505.
California Co. v. Reduction Co. 199 U. S. 306.

As was declared by Mr. Justice Magie, speaking for the Supreme Court in State v. Wheeler, 44 L. 91, in a case involving the
75 construction of an act, designed to protect the waters, creeks, and ponds of the State from pollution; "The design of the act is not to take property for public use, nor does it do so within the meaning of the constitution. It is intended to restrain and regulate the use of private property, so as to protect the common right of all the citizens of the State. Such acts are plainly within the police power of the legislature, which power is the mere application to the whole community of the maxim Sic utere tuo ut alienum non laedas. Nor does such a restraint, although it may interfere with the profitable use of property, by its owner, make it an appropriation to a public use, so as to entitle him to compensation," citing

Com. v. Alger, 5 Cush. (Mass.) 53.
Com. v. Tewkesbury, 11 Met. (Mass.) 55.

But the logical, and as it seems to us, conclusive answer to the defendants' contention, is that they are not only subsidiary political divisions of the State, exercising their delegated powers, presumably and exclusively in the public interest, but ex necessitate their business and property are thereby expressly affected with a public interest; and under well settled rules of law, become thereby subject to the exercise of the police power when exerted by the State in behalf of the general body politic. This doctrine was promulgated by the United States Supreme Court in 1876 in Munn v. Illinois, 94 U. S. 113, and it has been consistently and repeatedly followed in subsequent adjudications, in that court, and in the States generally, until the principle has now been placed beyond the pale of controversy. The principle there laid down was that "Property does become clothed with a public interest, when used in a manner to make it of public consequence, and affect the community at large. When therefore one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public, for the common good, to the extent of the interest he has thus created."

76 Mr. Justice Bradley reiterated this view in a dissenting opinion in the Sinking Fund cases, 99 U. S. 700, wherein he observes; "When an employment or business becomes a practical monopoly to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

To the same effect are:

Budd v. New York, 143 U. S. 517.
Brass v. Sloesser, 153 U. S. 391.
Cotting v. Kansas City, 183 U. S. 79.
Cooley Const. Lim. 734.

The principle has been applied to companies supplying water and gas.

Spring Valley Water Works v. Schottler, 110 U. S. 347.
San Diego Land Co. v. National City, 174 U. S. 739.
Mobile v. Brenville Water Co. 130 Ala. 799.

Many of these adjudications have extended the exercise of the police power to the regulation of rates and charges for water consumed as in the Granger cases.

Chicago etc. R. R. v. Iowa, 94 U. S. 155.

Subsequent adjudications have modified the exclusive and uncontrolled power of the legislature, in that regard, to the extent of declaring that the rates fixed by legislation must be reasonable, and to that end must be subject to judicial review.

Railroad Commission Cases, 116 U. S. 307.
Smith v. Anes, 169 U. S. 466.

Under the general power of regulation in the public interest, existing public and quasi public corporations, like foreign and domestic insurance and warehouse companies, and miscellaneous corporations of a quasi public character, have been subjected by legislation to the payment of License fees and general regulatory requirements.

Cargill v. Minnesota, 174 U. S. 96.
77 Carroll v. Greenwich Inc. Co. 199 U. S.
Fidelity Assn. v. Mettler, 185 U. S. 308.

The summation of the doctrine is contained in the statement that "The State under its power to enact laws for the general welfare of its people, may pass laws designed to increase the industries of the State, develop its resources, and add to its wealth; for instance laws forbidding any waste of natural gas or water which would be detrimental to the public as distinguished from an injury to an individual."

6 R. C. L. 212 and cases cited.
Smith v. Texas, 233 U. S. 630.

A practical application of this principle is notably evinced in People v. Beakes Dairy Co. 222 N. Y. 416, where it is declared that "The State may to some extent compel honesty, by imposing a license fee, if wide spread frauds upon and losses are thereby prevented. Any trade, calling or occupation may be reasonably regulated if the general nature of the business is such, that unless regulated many persons may be exposed to misfortunes against which the legislature can properly protect them."

As the possession of the greater includes the lesser power, a fortiori the power to regulate charges, rates and general conditions must also carry the power to license for the prosecution of business in future, by a public agency, performing a public function as the delegated agent or arm of the State.

It is unnecessary therefore to determine for the purposes of this case, the extent to which the State may exert its power in the general public interest, as between what the defendants allege to be the private or property rights of the municipalities, and their political characteristics. It is enough for present purposes to affirm the right
of the State to regulate in the public interest, the use of an
78 indispensable natural commodity, committed by society to its
care, development and conservation, by the imposition of a reasonable regulatory fee for the use only in futuro, by the body politic or public agency, whose unrestricted operation may result in segregating for local use entirely, the common property of the people. Such a regulation is in no legal sense a taking of private property, or a violation of any contractual right, but rather a regulation of the use of a common commodity by local public agencies, in the general interest of the entire community.

These views lead to an affirmance of the judgment.

Endorsed: "Filed Mar. 6, 1922. Thomas F. Martin, Clerk.

79 State of New Jersey,

[Vignette.]

Department of State.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby Certify that the foregoing is a true copy of an opinion read by said Court in the above-stated cause, November Term, 1921, as the same is taken from and compared with the original now remaining on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal at Trenton, this Twelfth day of June, A. D. 1922.

[Seal of the Secretary of State of New Jersey.]

THOS. F. MARTIN,
*Secretary of State.*

[Endorsed:] New Jersey Court of Errors and Appeals, November Term, 1921. Between State of New Jersey v. The City of Trenton. The State of New Jersey v. The City of Newark. Opinion. Filed June 13, 1922. Enoch L. Johnson, Clerk.

80 New Jersey Supreme Court.

[Vignette.]

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

Witness, My hand and the seal of the Supreme Court this eighth day of June, A. D. Nineteen hundred and twenty-two.

[Seal of the Supreme Court.]

ENOCH L. JOHNSON,
*Clerk.*

81 [Endorsed:] New Jersey Supreme Court. State of New Jersey, Defendant in Error, vs. The City of Trenton, Plaintiff in Error. Copy of Judgment, &c. Charles E. Bird, Attorney of Plaintiff in Error. Thomas F. McCran, Attorney General, Attorney of Defendant in Error. Clerk's Office, Trenton, $11.90.

Endorsed on cover: File No. 28,980. New Jersey Supreme Court. Term No. 430. The City of Trenton, plaintiff in error, vs. The State of New Jersey. Filed June 14th, 1922. File No. 28,980.

Office Supreme Court, U. S.
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CLERK

# Supreme Court of the United States

## October Term, 1922
## No. 430

THE CITY OF TRENTON,
*Plaintiff in Error.*

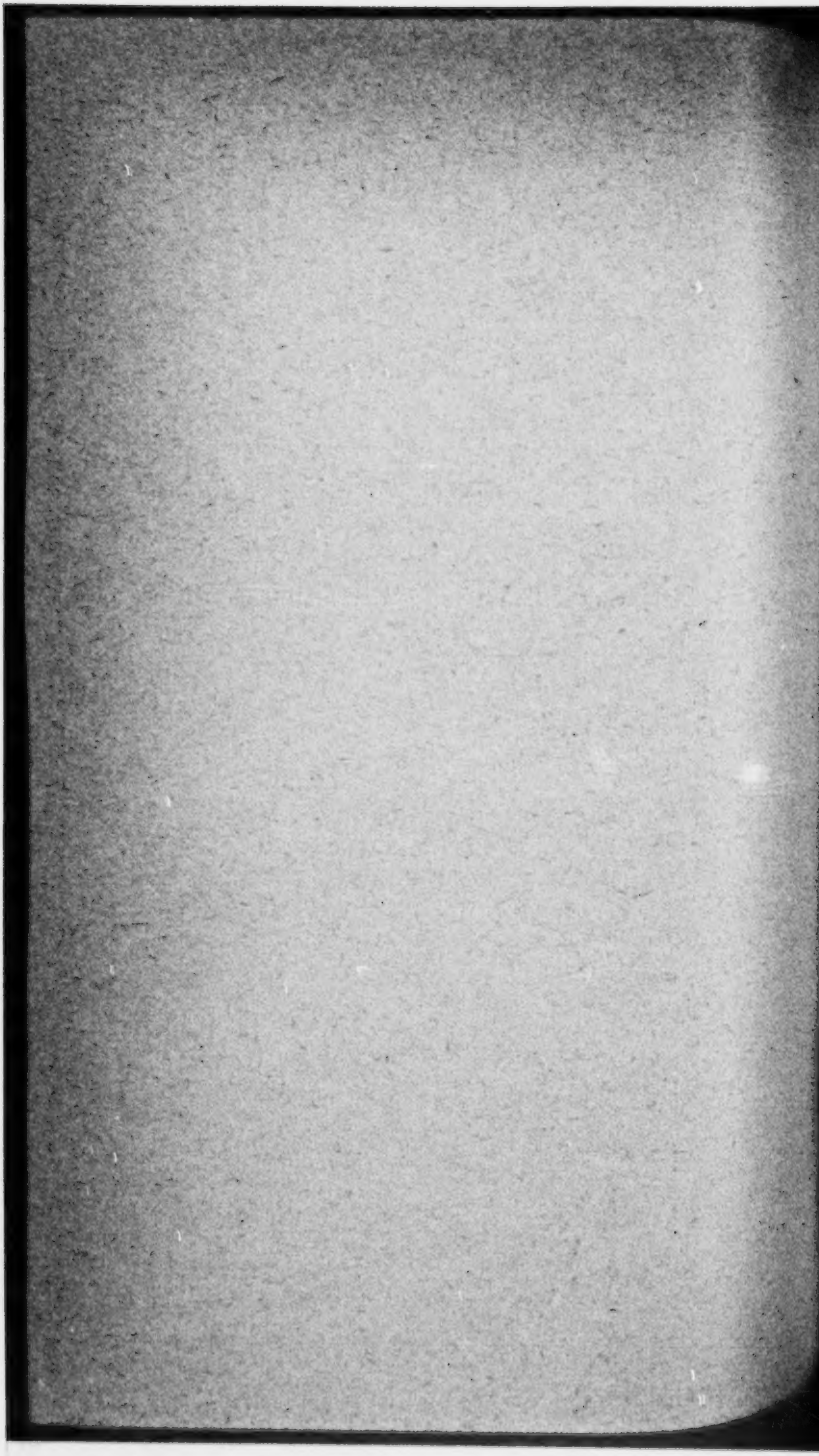
vs.

THE STATE OF NEW JERSEY

# BRIEF OF PLAINTIFF IN ERROR

CHAS. E. BIRD,
A. V. DAWES,
*Attorneys and Counsel for City of Trenton, Plaintiff in Error.*

Royal Printing Co., Inc., Trenton, N. J.



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# Supreme Court of United States

**October Term, 1922**

**No. 430**

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**The City of Trenton, Plaintiff in Error**

**vs.**

**The State of New Jersey**

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**In Error to The Supreme Court of the State of New Jersey**

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## BRIEF

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The Federal question involved in this case is whether or not an act of the legislature of the State of New Jersey entitled, "An Act to establish a state water supply commission and to define its powers and duties and the conditions under which waters of this state may be diverted," Chapter 252 of the Session Laws of 1907, which statute is contained in the Compiled Statutes of New Jersey, Vol. 4, p. 5797, impairs the charter rights of the City of Trenton as the successor of the Trenton Water Works under the contract clause of the federal constitution and its vested rights under the 14th Amendment.

The defendant in error, the State of New Jersey, began suit against the plaintiff in error, the City of Trenton, a municipal corporation of New Jersey, to recover license fees alleged to be due the State under the act

above mentioned for diverting waters from the Delaware River in excess of the minimum amount therein permitted. The plaintiff in error set up in its answer that it possessed charter rights and franchises and vested rights as the successor of the Trenton Water Works to take from the Delaware River all the water it required, which were inviolable against **action by the State, and that these rights were vested and protected against impairment under** the 14th Amendment to the Constitution.

The defendant in error moved the State Supreme Court to strike out the answer setting up these defenses, the effect of which motion was to admit the truth of the allegations of the answer, and thereby raise the sufficiency of the answer as a question of law. The defendant in error prevailed in the Supreme Court, the answer was struck out and judgment entered in favor of the State against the plaintiff in error for $14,310.00. The judgment of the Supreme Court was removed into the Court of Appeals of New Jersey, and was affirmed; the court holding that the Act of 1907 was a mere police act and that the plaintiff in error was a municipal agency of the State and possessed no rights against the legislative action of the State, its property being affected with a public interest.

The act under which the State claimed, Chap. 252 of the Session Laws of 1907, provided that there should be a commission of five citizens of this State to have "supervision over all the sources of potable and public water-supply, to the end that the same may be economically and prudenly developed for use of the people of this State."

Section 2 provided that no municipal corporation engaged in supplying or proposing to supply the inhabitants of any municipal corporation with water should have power

to condemn lands or waters for any new or additional source of water supply, or to divert water from any new or additional source until such municipal corporation should first submit its plans and maps to said commission and receive the approval thereof.

This section also contains the provision that "nothing in this act shall be construed to take from any municipality in this State the right to use and take all the water which it has the right to use or appropriate by purchase or condemnation."

Section 3 provides that a municipal corporation may apply by a petition for obtaining a new or additional source of water supply, and that after due hearing the commission shall decide whether the plans proposed are justified by public necessity or reasonably anticipated public use. Such commission shall, within ninety days, approve or reject the application under such reasonable terms and conditions as may be prescribed. This section contains the following important paragraph: "The approval of the commission shall constitute the State's assent to the diversion of water and the construction and operation of water-works in accordance with the terms of the decision and the plans filed therewith."

Section 8 reads as follows: "Every municipality, corporation or private person now diverting the waters of streams or lakes with outlets for the purpose of a public-water supply shall make annual payments on the first day of May to the State Treasurer for all such water hereafter diverted in excess of the amount now being legally diverted; provided, however, no payment shall be required until such legal diversion shall exceed a total amount equal to one hundred (100) gallons daily, per capita for each inhabitant of the municipality or municipalities supplied, as

shown by the census of one thousand nine hundred and five. And every municipality, corporation or private person not at present diverting surface waters for said purpose, but who shall hereafter divert such waters, shall make annual payments on the first day of May to the State Treasurer for all waters diverted in excess of a total of one hundred (100) gallons daily for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. Such payment shall be deemed to be a license and its amount shall be fixed by said commission at a rate of not less than One Dollar ($1.00) or more than Ten ($10.00) Dollars per million gallons. * * * Nothing in this Act shall be construed to confer upon any municipality, corporation or person any franchise not already possessed by said municipality, corporation or person, but the approval of the said commission contained in its decision as above provided shall constitute the assent of the State to the diversion of water as against the State in accordance with the terms of said decision."

## The Answer of the Plaintiff in Error

Among the defenses set up by the plaintiff in error by way of answer to the state's complaint, was a grant made by the state to the "Trenton Water Works," its predecessor in title, which defense, as amended, reads in art as follows:

"1. The defendant required all the water used and taken for its corporate purposes, and had and possessed the right to use and take all the water from the Delaware River that it required, without limitation as to quantity, and without the payment of any license fee for any part of the water so used

and taken during the year or part thereof specified in each of the said several counts of the complaint, which said right was acquired by the 'Trenton Water Works' by grant direct from the State of New Jersey, March 24, 1852, and was acquired by the defendant by the duly authorized purchase of such right from the said 'Trenton Water Works' in manner following." (Transcript of record, p. 25, amended p. 40-41).

The charter rights which the plaintiff in error set up in its answer (transcript of record, pages 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40) are these:

First, An act to incorporate the proprietors of the Trenton Water Works, passed February 29, 1804. It provided that certain gentlemen should be created a body politic and corporate with power to dispose of use of water to such as may apply therefor. This act was followed by a supplement thereto passed March 24, 1852, and provided that "The President and Directors of the Trenton Water Works should be authorized and empowered to take the water which they may require, either in whole or in part, from the Delaware River, and to that end they were vested with all the powers necessary to purchase or hold such real estate and keep up and maintain such reservoirs, aqueducts and apparatus for elevating the water, and such erections in the Delaware River not obstructing navigation as may in the opinion of the said corporation be required to effectuate the objects of the said act, and that may be needed to conduct water from the river to their reservoirs and from the reservoirs to such part of the city and its vicinity as they may deem expedient. Powers of condemnation were provided for acquiring lands, etc., in the second and third sections.

The seventh section of the Act provided that the President and Directors of the Tren-

ton Water Works shall continue to have and possess all the powers, rights, franchises and privileges which they now have or possess by virtue of the Act to which this is a supplement, and that the rights, powers, franchises and privileges shall be deemed to be enlarged so as to embrace the rights, powers, franchises and privileges given to said corporation by this Act to all intents and purposes as if the same had been conferred upon said company at the time it was first established. On March 2, 1855, an act was approved authorizing the City of Trenton to purchase the whole or a part of the capital stock of the Trenton Water Works Company (transcript of record. p. 32). On March 1, 1859, an act of the legislature was passed and approved authorizing "The President and Directors of the Trenton Water Works to convey their works and franchises to the City of Trenton and to provide for the management of said works," (transcript of record, p. 34). The act provided that the Trenton Water Works were hereby required to convey to "The Inhabitants of the City of Trenton" all the real estate, works and property, and all the corporate rights, powers, franchises and privileges of said company, and that upon the due execution of such conveyance the legal title to said works and property, and all the corporate rights, powers, franchises and privileges of the said company should pass to and vest in "The Inhabitants of the City of Trenton" in as full and ample a manner as the same now are or heretofore were held and enjoyed by the said company.

On the 7th day of March, 1859, (transcript of record, p. 38) the President and Directors of the Trenton Water Works duly conveyed to the Inhabitants of the City of Trenton, their successors and assigns all the lands, tenements, hereditaments and real es-

tate, works and property, and all the corporate rights, powers, ranchises and privileges. together with the appurtenances to the same belonging, and all the estate, rights, title, interest, use, possession, property, claim and demand of the President and Directors of the Trenton Water Works to have and to hold he same to the proper use, benefit and behoof of the Inhabitants of the City of Trenton, according to the form, force and effect of the aforesaid Act of the legislature.

## ASSIGNMENT OF ERRORS

The City of Trenton, the plaintiff in error, here asserts and urges that the Court of Errors and Appeals of the State of New Jersey erred in the rendering of judgment and decision in this cause in the following particulars, to wit:

First. The court erred in holding that Section 8 of an act of the legislature of the State of New Jersey entitled, "An Act to establish a state water supply commission, and to define its powers and duties and the conditions under which waters of this state may be diverted," approved June 17, 1907 (being Chapter 252 of the Laws of 1907) was constitutional, and did not offend against Article I, Section 10, paragraph 1 of the Constitution of the United States, and did not impair the obligation of a Charter contract existing between the State of New Jersey and the City of Trenton, the successor in title of the rights, powers, franchises and privileges granted to "The Trenton Water Works," by force of an act of the legislature of the State of New Jersey entitled, " A Supplement to the act entitled, 'An Act to incorporate the proprietors of the Trenton Water Works, passed the twenty-ninth day of February, A. D. One Thousand Eight Hundred and Three,'

which supplement was approved March 24, 1852."

Second. The said Court of Errors and Appeals of the State of New Jersey erred in holding that said act of June 17, 1907 (being Chapter 252 of the Laws of 1907) is constitutional, and does not take the property owned by the City of Trenton in its private or proprietary capacity for public use, without just compensation, and does not violate the Fourteenth Amendment to the Constitution of the United States.

Third. The said Court of Errors and Appeals of the State of New Jersey erred in holding that said act of June 17, 1907 (being Chapter 252 of the Laws of 1907) does not deprive the City of Trenton of property without due process of law, and does not contravene the Fourteenth Amendment to the Constitution of the United States.

## ARGUMENT

**The Act to incorporate the proprietors of the Trenton Water Works, and its supplement above recited, constituted an irrepealable charter in the Trenton Water Works.** The supplement provided that the previous rights, powers and franchises should be taken to have been conferred on the said company as of the time it was first enacted in 1804. The act intended that the Trenton Water Works, should erect, at its own expense, a water plant to supply the City of Trenton and vicinity with all the water it required. It gave the right and franchise to take all the water it required from the Delaware River and thereby reciprocal obligations and duties arose. Under the decisions of New Jersey these acts created an irrepealable charter. The leading and most recent cases in New Jersey upon this subject are Singer Mfg. Co.

v. Heppenheimer 58 N. J. L. 633 and Hancock v. Singer Mfg. Co. 62 N. J. L. 289. The facts in the first case were that the Singer Mfg. Co., was chartered by special act of the legislature in 1873 with a capital stock of ten millions of dollars duly issued. The controversy related to an assessment of $4212.50 made by the State Board of Assessors against the company for the year 1891 under the supplement to an act entitled "An Act to provide for the imposition of state taxes upon certain corporations, and for the collection thereof." The 6th section of the act chartering the Singer Mfg. Co., provided that the real and personal property of the said corporation should not be liable to any tax or impost whatsoever. The court, at p. 635 said: "The question to be solved is whether the sixth section of its charter constitutes an irrepealable contract with the State, and if it does, whether the imposition of this tax violates the contract.

"The sixth section contains all the elements of a contract. There are present a subject-matter, parties and a consideration-on the one side is a complete performance, and on the other, acceptance. That it is a contract under our adjudications there can be no question." (Citing cases).

"Is this contract irrepealable?

"If the sixth section of the charter of the company contains the entire contract, it is unassailable by state legislation. Both the Federal and State constitutions inhibit the passage of any law by the state impairing the obligation of a contract. The state attempts to justify this tax by reading into the charter of the Singer Company, the sixth section of the act of 1846 (Pamph. L., p. 16), which is as follows:

"The charter of every corporation which shall hereafter be granted by or created under any of the acts of the legislature, shall be sub-

ject to alteration, suspension and repeal in the discretion of the legislature.

"In New Jersey v. Yard, 95 U. S. 104, the Supreme Court of the United States declared that notwithstanding the Act of 1846, it was competent for the state legislature to make an irrepealable contract, and that therefore it was in every case a question whether it was intended to preserve to the state the right to repeal the contract at will.

"Unless, therefore, such an intention can fairly be drawn from the terms of the contract, as agreed upon by the parties, there can be no departure from it.

"There is nothing in the language of this contract which gives the slightest foundation for the suggestion that the state reserved the right to deprive the company at will of the benefit it was to receive under the agreement, after full performance by the company.

"The undertaking is express, that if, and so long as the Company shall invest and keep invested $500,000 in real estate in this state, the exemption shall continue. There is no uncertainty in that respect; it excludes most clearly the idea that the act of 1846 was to be deemed a part of this charter.

"It cannot be conceived that either the state or the company entered into a contract by which it was understood or intended that the state should be at liberty to deprive the company of the benefit to be derived from it as soon as the company had performed on its part. Such a proposition could not have been seriously made on the part of the state, nor for a moment entertained on the part of company."

"The terms of the contract, and the circumstances attending it, repel the assumption that the entire engagement is not expressed in the sixth section of the act of incorporation.

"The contract must be regarded as irrepealable. The real question in the cause is, what is its true meaning and construction?

"When a contract is fairly made, the good faith of the state must be preserved, and the contract performed according to a reasonable and just interpretation of it."

This case was followed by Hancock, Comptroller v. Singer Mfg. Co., 62 N. J. L. 289. at page 328 our Court of Appeals discussing the irrepealability of the charter in connection with an act of the legislature of 1846 declared as follows:

"The charter of every corporation which shall hereafter be granted by or created under any of the acts of the legislature, shall be subject to alteration, suspension and repeal in the discretion of the legislature." Our Court of Appeals, in respect of that section, said at 328—"for many years after the passage of this act it was uniformly held by the courts of this state that the sixth section of the Act of 1846 was to be literally read into every charter thereafter granted by the legislature, thereby rendering every such charter subject to repeal or alteration at legislative discretion. Such was the judgment of this court in Morris & Essex Railroad Co. v. Commissioners of Railroad Taxation, 9 Vroom 472, decided in 1875. That case was removed to the Supreme Court of the United States and the decision of this court was reversed. New Jersey v. Yard, 95 U. S. 104. The federal court, in reversing, declared that a legislature could not bind its successors; that, notwithstanding the act of 1846, it was still competent for any legislature to make an irrepealable contract if it elected to do so, and that it was therefore a question in every case of a contract made by the legislature whether that body intended that the right to change or repeal it should inhere in it, or whether like

other contracts, it was perfect and without the power of the legislature to impair its obligation. The federal court held the contract under consideration in that case to be irrepealable because it could not be believed that it was the intent of either party to it that one should be held forever and the other merely at will, and it refused to read the act of 1846 into the contract because the contract was inconsistent with it. The rule thus so explicity laid down by the federal court has since been accepted as the law of this court. State Board v. Morris & Essex Railroad Co., 20 Vroom, 193. Unless, therefore, an intention can fairly be drawn from the terms of this contract, as agreed upon by the parties, to reserve to the state the right to repeal the contract at will without the consent of the company, there can be no departure from it."

We submit that the legislative acts above set forth indicate clearly the purpose to confer upon the "Trenton Water Works" an irrepealable charter. The provisions, p. 31, section 7 of the Act that these corporate powers, rights and franchises should be deemed to have been conferred on the company as of December 1804, can have but one meaning and effect; that these provisions were to be held to have preceded the legislative act of 1846 respecting the repeal of charters, and evince a legislative intent in accordance with the case of New Jersey v. Yard, 95 U. S. 104, not to be bound by the act of 1846. It was perfectly competent for the legislature to declare as against itself of what time a supplement or an amendment to an act should take effect, whether at the time the original act was passed or at the time the supplemental act was passed. In Walla Walla v. Walla Walla Water Company, 172 U. S. 1, Mr. Justice Brown said: "But it is sufficient for the purposes of this case to say

that this court has too often decided for the rule to be now questioned that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets upon the condition of the performance of its services by the grantee, is the grant of a franchise vested in the state in the consideration of the performance of a public service, and after performance by the grantee is a contract protected by the Constitution of the United States against state legislation to impair it." (page 9)

Second. **The Acts of the legislature authorizing and empowering the City of Trenton to purchase a part or the whole of the capital stock of the "Trenton Water Works," and authorizing the President and Directors of the Trenton Water Works to convey their works and franchises to the City of Trenton, and providing for the management of said works followed by an execution of a deed of grant, effected a conveyance of all the corporate rights, franchises and property to the Inhabitants of the City of Trenton.**

The City of Trenton, thus succeeded to all the rights of "The Trenton Water Works," and stands with respect of those rights in its place, and is entitled to the benefit of the Company's contact with the **State.**

The case of State of New Jersey v. Wilson, 7 Cranch, 164, sustains this contention. That case arose in the State of New Jersey and was removed by writ of error into this court. The litigation discloses that the State of New Jersey had set apart certain lands for the Indians and had declared that the lands to be purchased for the Indians, aforesaid, shall not hereafter be subject to any tax, any law, usage, or custom to the contrary thereof in any wise notwithstanding. These lands were purchased and conveyed to trustees for the us of the In-

dians. Later the Indians having become desirous of migrating from the State of New Jersey obtained an act from the legislature of New Jersey authorizing a sale of their lands in this state. The lands were sold by virtue of the act. Afterwards the legislature passed an act repealing that section which exempted these lands from taxation. The state court declared the repealing act was valid. Chief Justice Marshall said, "Every requisite to the formation of a contract is found in the proceeding between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated the consideration agreed upon, which is a tract of land with the privilege of exemption, from taxation; and then, in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it.

"It is not doubted but that the State of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the State, with all its privileges and immunities. The purchaser succeeds, with the assent of the State, to all the rights of the Indians. He

stands, with respect to this land, in their place, and claims the benefit of their contract. This contract is certainly impaired by a law which would annul his essential part of it."

The Court of Chancery of New Jersey, in the case of Wilson Attorney General v. The East Jersey Water Co., 13 Buchanan, 42 (83 N. J. Eq. 42) declared "The authorities * * * lead inevitably to the conclusion that when the legislature has authorized a municipality to procure a water supply, it has, by necessary implication, granted the state's right in so much of the water of the stream, from which the supply is to be taken, as the municipality may need."

We therefore submit that there is now vested in the plaintiff in error, charter-contract rights of the same effect as they were formerly vested in the water company.

Third. The City of Trenton as the grantee and successor in title of the Trenton Water Works holds the corporate franchise of the Trenton Water Works by as inviolable a title as the Trenton Water Works possessed those rights and franchises.

In Dartmouth College v. Woodward, 4 Wheaton, 518 at 694 Mr. Justice Story said:

"It will hardly be contended that even in respect to such (public corporations) the legislative power is so transcendent that it may, at its will, take away the private property of the corporation, or change the uses of its private funds acquired under the public faith.

"Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter without any default or consent of the corporators? If a municipal corporation be capable of holding devises and legacies to charitable uses, as many municipal corporations are, does the legislature under our forms of limited government

possess the authority to seize upon those funds and appropriate them to other uses at its arbitrary pleasure against the will of the donors and donees? From the very nature of our governments the public faith is pledged the other way; and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction and abrogation. This court has already had occasion to express its opinion on this subject; and there is not the slightest inclination to retract it."

Mount Hope Cemetery Co. v. City of Boston, 158 Mass., 509, was a case where the legislature had provided for the organization of the Mount Hope Cemetery Company and had also provided that the City of Boston should convey to such Cemetery Company all the lands constituting a cemetery, together with the stocks, tools, implements, and other personal property appertaining thereto, or commonly used therein. The question came up upon mandamus to compel the City of Boston, and its Mayor, to transfer such cemetery to the Cemetery Company, and the court refused to issue it considering that this act was not a proper exercise of the legislature control over municipal corporations, inasmuch as it was an attempt to require the transfer of private property without compensation, and was contrary to the constitution of the United States. Judge Allen, who wrote the opinion said "by quite general concurrence of opinion this legislative power of control is not universal, and does not extend to property acquired by a city or town for special purposes not deemed strictly and exclusively public and political, but in respect to which a city or town is deemed rather to have a right of private ownership of which it cannot be deprived against its will, save by the right of eminent domain with payment of compensation. In this commonwealth the question has not directly

arisen in reference to the power of the legislature to compel a transfer of the property of a city or town, but the double character of cities and towns in reference to their duties and liabilities has been very often adverted to.

"The conclusion to which we have come is this—that the cemetery falls within the class of property which the city owns in its private or proprietary character as a private corporation might own it, and that its ownership is protected under the constitution of the United States, so that the legislature has no power to require its transfer without compensation * * *. The City of Boston is possessed of much other property which in a certain sense, and to a certain extent, is held for the benefit of the public, but in other respects it is held more like the property of a private corporation. Notably among these may be mentioned its system of water works, its system of parks, its markets, its hospitals and its library. In establishing all these the city has not acted strictly as an agent of the state government for the accomplishment of general public or political purposes, but with special reference to the benefit of its own inhabitants. If its cemetery is under legislative control so that a transfer of it, without compensation can be required it is not easy to say why the other properties mentioned are not also; and all the other cities and towns which own cemeteries, or other properties of the kinds mentioned, might be under a similar liability."

In Vilas v. Manila, 220 U. S. 345, the question before the court was whether certain creditors of the City of Manila, as it existed before the cession of the Philippine Islands to the United States by the treaty of Paris, could maintain an action against the City of Manila after it became subject to the jurisdiction of

the United States. The Supreme Court of the Philippine Islands had denied relief, holding that the present municipality was a totally different corporate entity and in no way liable for the debts of the Spanish municipality. Mr. Justice Lurton, delivering the opinion at p. 355, said: "If we understand the argument against the liability here asserted, it proceeds mainly upon the theory that inasmuch as the predecessor of the present city, the Ayuntamiento of Manila was a corporate entity created by the Spanish government, when the sovereignty of Spain in the Islands was terminated by the treaty of cession, if not by the capitulation of August 13, 1898, the municipality ipso facto disappeared for all purposes. This conclusion is reached upon the supposed analogy to the doctrine of principal and agent, the death of the principal ending the agency. So complete is the supposed death and annihilation of a municipal entity by extinction of sovereignty of the creating State that it was said in one of the opinions below that all the public property of Manila passed to the United States "for a consideration, which was paid" and that the United States was therefore justified in creating an absolutely new municipality and endowing it with all the assets of the defunct city, free from any obligation to the creditors of that city. And so the matter was dismissed in the Tregas Case by the court of first instance, by the suggestion that "the plaintiff may have a claim against the crown of Spain, which has received from the United States payment for that done by the plaintiff.

"We are unable to agree with the argument. It loses sight of the dual character of municipal corporations. They exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a

governmental subdivision, and for that purpose exercises by delegation a part of the sovereignity of the State. In the other character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred.

"The distinction is observed in South Carolina v. United States, 199 U. S. 437, 461 where Lloyd v. Mayor of New York, 5 N. Y. 369, 374, and Western Savings Society v. Philadelphia, 31 Pa. St. 175, are cited and approved. In Lloyd v. New York, supra, it is said: 'The corporation of the city of New York possesses two kinds of powers: one governmental and public, and, to that extent they are held and exercised, is clothed with sovereignity; the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used or public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government; and while in the exercise of the latter, is a corporate legal individual.'

"See also Dillon Mun. Corp., (4th ed.) 66, Petersburg v. Applegarth's Administrator, 26 Gratt. 321, 343; and Oliver v. Worcester, 102 Mass. 489.

"In view of the dual character of municipal corporations there is no public reason for presuming their total dissolution as a mere consequence of military occupation or territorial cession. The suspension of such governmenal functions as are obviously incompatible with the new political relations thus brought about may be presumed. But no such implication may be reasonably indulged beyond that result."

And this court in South Carolina v. United States, 199 U. S. 437 at 461, said: "In this connection may be noticed the well-establish-

ed distinction between the duties of a public character cast upon municipal corporations and those which relate to what may be considered their private business and the different responsibility resulting in case of negligence in respect to the discharge of those duties. The Supreme Court of Massachusetts speaking by Mr. Justice Gray in Oliver v. Worcester, 102 Mass. 489, 499, 500, observed 'The distinction is well-established between the responsibilities of towns and cities for acts done in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, in the management of property or rights voluntarily held by them for their own immediate profit or advantage as a corporation, although of course inuring to the benefit of the public.*** Such contracts are not made by the municipal corporation by virtue of its powers of local sovereignty, but in its capacity as a private corporation. The supply of gas light is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city it is a special private franchise made as well for the private emolument and advantage for the city as for the public good. The whole investment is the private property of the city as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well settled distinction and the process of separation is not rendered impossible by the confusion. In separating them regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively,

they belong to the corporate body in its public political or municipal character. But if the grant was for the purposes of private advantages and emolument, though the public may derive a common benefit therefrom, the corporation quoad hoc is to be regarded as a private Company. It stands on the same footing as would any individual or body of persons upon whom the like special franchise had been conferred."

We submit that the City of Trenton owns the Water Works in its proprietary capacity, and that it is entitled to the same rights and privileges with respect to taking water from the Delaware River that its grantors had and that its legal right is precisely the same as that of its predecessor in title.

The distinction between political and governmental matters in which municipalities are the representatives of the sovereignty of the state, and auxiliary to it, and other matters relating to property owned by them, in their private capacity, in which they have the attributes and distinctive legal obligations and liabilities of private corporations, is clearly recognized by the Supreme Court of our State in the following cases: Tomlin v. Hildreth, 65 N. J. L. 438; Bisbing v. Asbury Park 80 Id. 416-419 and Karpenski v. South River, 83 Id. 149.

In the Karpenski case the Supreme Court of our State, speaking by Mr. Justice Voorhees said: "The operation of an electric lighting plant for the furnishing of light to private consumers for gain can not, in any sense, be the performance of a governmental function. Under a somewhat similar statute in England for the supplying of gas to a city, it was so held in Scott v. Mayor of Manchester, 1 H. & N. 59; S. C. on appeal, 2 Id. 204, where a judgment for the plaintiff was sustained. Several cases bearing upon this sub-

ject may be found cited in Bisbing v. Asbury Park, 51 Vroom 416."

Unquestionably a municipality of our state operating a water plant for furnishing water to private consumers for gain is within the rule pronounced by our Supreme Court and holds and operates such plant subject to the distinctive legal rights and liabilities of a private corporation.

Fourth. The Act of 1907 as construed by the Court below in this case violates the constitutional rights of the plaintiff in error.

It is important to study the act. The first section provides for the appointment of the Commission and charges them "with a general supervision over all the sources of potable and public water supply to the end that the same may be economically and prudently developed for the use of the people of this State," Evidently the supervision there provided for is of the undeveloped sources of supply.

The second section provides that a municipal corporation, corporation or person engaged in supplying or proposing to supply the inhabitants of any municipal corporation with water shall have no power to condemn lands or water for any new or additional source until they shall have first submitted their plans to, and received the approval of the Commission. Two provisos follow making the section inapplicable to a case where a municipality proposes to acquire an existing or operating water works already supplying such municipality, and also making it inapplciable to a case where a municipal corporation had already commenced the construction of works, if the maps and plans therefor are filed within a short time. Then follows the important provision "nothing in this act contained shall be construed to take from any municipality in this State the right to use and

take all the water which it has the right to use and appropriate by purchase or condemnation."

The third section provides for an application to the Board by any municipal corporation, corporation or person for the approval of its plans for obtaining such new or additional source of water supply. The applicant is required to give notice "of a public hearing at which all persons or municipalities affected by the proposed plans may be heard for or against the granting of the application." A hearing is then provided for and a written decision which, if favorable, "shall constitute the State's assent to the diversion of water and the construction and operation of the water works in accordance with the terms of the decision and the plans filed."

The fourth section supplies the legal machinery for an effective hearing before the Board.

The fifth section provides for annual reports by all municipal corporations, corporations or persons diverting water for supply purposes as to the amount of water diverted by them, the communities supplied, etc.

The sixth section provides for the personnel of the Commission and their salaries, officers and expenses.

The seventh section provides for an annual report by the Board.

The eighth section (being the one under which suits like the present are brought) provides that every municipal corporation or private person now diverting the waters of streams or lakes for the purpose of a public water supply shall make annual payments on the first day of May to the State Treasurer for all such water hereafter diverted in excess of the amount now being legally diverted "Provided,

"however, no payment shall be required until such legal diversion shall exceed a total amount equal to one hundred (100) gallons daily, per capita for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. And every municipality, corporation or private person not at present diverting surface waters for said purpose but who shall hereafter divert such waters shall make annual payment on the first day of May to the State Treasurer for all waters diverted in excess of a total of one hundred (100) gallons daily for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. Such payment shall be deemed to be a license and its amount shall be fixed by said commission at a rate of not less than one dollar ($1.00) or more than ten dollars ($10.00) per million gallons."

The same section provides the legal machinery for the recovery of the amounts assessed and declared to be due, and appropriates the receipts to a special fund for the control of the waters and the diversion of the water supply of the State. It is careful, however, to provide "Nothing in this act shall be construed to confer upon any municipality, corporation or person any franchise not already possessed by said municipality, corporation or person, but the approval of the said commission contained in its decision as above provided shall constitute the assent of the State to the diversion of water as against the State, in accordance with the terms of that decision."

The remaining two sections of the act are unimportant so far as this controversy is concerned.

It will be noticed that the act really has a three-fold purpose: (1) the creation of the supervisory board; (2) the prevention of

further diversion of State waters than already exists without the permission of this Board; and (3) an obligation on the part of those who shall divert to pay a certain sum to the State for State purposes for all waters in excess of a certain amount over and above that being legally diverted. Both the body of the act and its title plainly indicate that the Legislative concern was to prevent the acquisition of new diverting rights in any manner without the consent of the Commission. The title is "An act to establish a State water supply commission and to define its powers and duties and the conditions under which waters of this State may be diverted."

The obvious purpose was to prevent a continuance of the theretofore frequent practice of municipalities and water companies indiscriminately diverting water without the State's consent; to require a careful consideration after hearing of the proposition so to divert, and to finally bestow the right, which right, thus bestowed, shall constitute the State's assent to the proposed diversion. It is ridiculous to suppose that there was any effort —could such an effort be constitutionally affected—to have the State bestow its assent to the diversion upon a municipality when, previous to the enactment of the act, such assent had already been given.

Neither the second section, which provides for the Board's assent nor the eighth section, which provides for the fees to be paid, pretends to apply to or to interfere without rights previously obtained. The second section is confined wholly to persons or corporations proposing to acquire a new or additional water supply and the eighth section only requires the payment of fees "for all such water hereafter diverted in excess of the amount now being legally diverted." There is not the slightest ground for the contention that

the Legislature intended to interfere with the rights of any municipality or corporation that had theretofore acquired from the State the right to divert waters. As if to make assurance doubly sure upon this point the last sentence of the second section is added "nothing in this act contained shall be construed to take from any municipality in this State the right to use and take all the water which it has the right to use or appropriate by purchase or condemnation."

The intention of the Legislature in passing Chapter 252 of the Laws of 1907 and providing for the payment of a license fee by water companies or municipalities for water used or diverted by them in excess of the amount diverted at the time of the passage of the act, was not in any way to require the payment of license fees from cities for the use of water that they had previously acquired from the State, although at the time of the passage of the act they were not actually diverting all the water they had, by such grant, the right to divert.

The Supreme Court in Collingswood v. The Water Supply Commission, 84 N. J. Law 104, 110, speaking of this act, said that "the policy of the State is one of determination to conserve, and as we view the matter, to economize to the fullest extent that is reasonable, the water resources of the State for the benefit of all its inhabitants. The growing scarcity of water-supply is a matter of common knowledge, and a great deal of fiercest litigation in the courts at the present time arises out of disputes over the ownership of water rights. Consequently, in looking at the acts of 1907 and 1910, this policy should be kept in mind; though indeed this is hardly necessary in view of the language of those very acts, for the act of 1907 in its very first section says that the State Water Supply Com-

mission shall be charged with a general supervision over all the sources of potable and public water supply, to the end that the same may be economically and prudently developed for the use of the people of this State."

The opinion then refers to the act of 1910 which applies to sub-surface waters and continues:

"The general effect of this Legislation is to invest the commission as a state agency with the fullest control over prospective drafts by municipalities, corporations, or private persons upon either surface or sub-surface supplies of water within the jurisdiction and boundries of the State; to charge it as such agency with the duty of prudently and economically dealing with the supply so as best to subserve the interests of the people of the State at large and not the interests of any particular locality; and to vest in the commission a judicial discretion with regard to permitting municipalities to draw upon that water-supply, such discretion to be exercised within the limits laid down by the statute and subject to review by the courts 'for reasonableness, legality and form.' "

That court in affirming the judgment of the Supreme Court in the case just referred to, 85 N. J. Law 673, 674, said, concerning the act in question:

"It is common knowledge that prior to the statute, to which reference will be made hereafter, municipalities, private corporations and individuals in different parts of this State were acquiring and diverting to their uses, a considerable portion of the public water-supply, some under laws which delegated such power to local governments established by the Legislature, but in many cases by those whose right to do so was, perhaps, of doubtful authority, and the potable waters of the

State were being rapidly gathered into the hands of a few, a condition which, in view of the rapid increase of population, became a cause of great anxiety, if not alarm, to such inhabitants of the State as were not benefited by such ever growing segregation for the use of particular localities.

"The question became so momentous that in 1907 the Legislature undertook to deal with it, and in that year (Pamph. L., p. 633), a statute was enacted which provided for the appointment of five persons to constitute a commission to be known as the State Water Supply Commission, 'charged with a general supervision over all the sources of potable and public water supply to the end that the same may be economically and prudently developed for the use of the people of the State'. Section 2 of this act declares that no municipal corporation engaged in supplying, or proposing to supply its inhabitants with water 'shall have power to condmen lands or water, or any new or additional source of water supply, or to divert water from such new or additional source until such municipal corporation, corporation or person has first submitted descriptions thereof, which shall be accompanied by maps and plans, to said commission, and until said commission shall have approved the same', Section 3 authorizes municipal corporations to make application to the commission for the approval of its plans for obtaining a new or additional source of water supply, and provides for a public hearing upon due notice at which all persons affected by the proposed plans may be heard for or against the granting of the application. It further provides that after due hearing 'the commission shall decide whether the plans proposed are justified by public necessity, or reasonably anticipated public use, and whether such plans interfere unduly with the op-

portunity of other municipalities to obtain a water supply by the taking of waters necessary for their use, or whether the reduction of the dry season flow of any stream will be caused to an amount likely to produce unsanitary conditions, or otherwise unduly injure public or private interests.' And it was also declared that the approval of the commission shall constitute the State's assent to the diversion of water and the construction and operation of water works."

We submit that this Court is at liberty to put its own construction upon the act and upon the phrase, "such payment shall be deemed to be a license."

"It forms its own independent judgment as to the scope and purpose of the statute while of course leaning to any interpretation which has been placed upon it by the highest court of the state." Atchison, Topeka, Santa Fe R. R. Co. v. Matthews, 174 U. S. 97 at 100.

The important case of State v. Jersey City 94 N. J. L., 431 in our Court of Appeals upon the effect of the provisions of section 2—that "nothing in this act contained shall be construed to take from any municipality of this State the right to use and take all the water which it has the right to use and appropriate by purchase and condemnation" should receive attention. Mr. Chief Justice Gummere said: "The arguments both of the Attorney General and of counsel for the municipality rest largely upon the theory that the case presents for consideration and determination the question whether, by virtue of the provision of section 2 of the act of 1907 above recited the City of Jersey City is entitled to abstract from the Rockaway River water to the amount of 50,000,000 gallons daily, without being subjected to the license fees which have been imposed upon it, notwithstanding the fact that at the time of the

enactment of the statute the amount of water abstracted by it was very much less. But this question we think is not ripe for determination. The section applies only to those munciipalities of the State which, at the time of the enactment, had the right to use and take water from the running streams, lakes, and ponds within the borders of the State; and, as the control of such waters rests in the state in its sovereign capacity as representative of and for the benefit of the people in common (McCarter v. Hudson County Water Co. 70 N. J. Eq. 695, 65 Atl. 489, 14 L. R. A. (N. S.) 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116), the only way in which a municipality can acquire the right to use and take such water is by a grant directly from the State itself, or by the duly authorized purchase or condemnation of such right from a third person, either corporate or individual, to whom it has already been granted by the State. There is nothing in the answer of the municipality which shows a grant by the State to the East Jersey Water Company of the right to abstract from the waters of the Rockaway River 50,000,000 gallons daily, or any other amount; and, of course, unless that corporation had, prior to the making of the contract set out in the answer, acquired from the State of New Jersey the right to abstract that water, it could not, by contract, or in any other way, confer such right upon the City of Jersey City."

We submit that the conclusion of the court below upon the statute of 1907 is against the clear meaning of the statute. But the statute thus construed is clearly unconstitutional under the authority of Northern Pacific R. R. Co. v. Duluth, 208 U. S. 583 wherein it is held that, "legislation which deprives one of the benefits of a contract or adds new duties or obligations

thereto necessarily impairs the obligation of the contract; and when the State court gives effect to a subsequent state or municipal statute which has the effect to impair the contract rights by depriving the parties of their benefit, and make regulations which the statute does not theretofore impose upon them, a case is presented for the Supreme Court."

**The Conclusions of the Lower Court in This Case Are These:**

1. The act does not in anywise contemplate a deprivation of an existing contractual status, but on the contrary expressly assumes the right of municipalities to extract water from their respective sources of supply, and imposes no tax thereon. It also assumes their right to continue to extract water from such sources as the demands of population and local exigencies may require. (Transcript of record, p. 46 at 74).

2. The legislature assumed the right of municipalities to extract water free of a license fee, upon the basis practically of present consumption; and therafter and beyond that limitation, it placed them and all future purveyors of water upon the same basis by the requirement of a license fee. (Ibid, p. 46).

3. But the logical, and the conclusive, answer to the defendants' contention, the court said, is that municipalities are only subsidiary political divisions of the state exercising their delegated powers, presumably and exclusively in the public interest. (Ibid. p. 47 at 75).

4. The business and property are affected with a public interest and under well settled rules of law become subject to the exercise of the police power when exerted by the state in behalf of the general body politic.

5. It is unnecessary to determine for the purpose of this case the extent to which the state may exert its power in the general public interest as between what municipalities allege to be private or property rights and their public interests.

6. It is enough to affirm the right of the state to regulate in the public interest the use of an indispensable natural commodity, committed by society to its care by the imposition of a reasonably regulatory fee.

Conclusions Nos. 1 and 2 seem to be repugnant to each other. The contractual status of plaintiff in error is contemplated by the statute, the court says, and permits it to extract water as the dmeands of population and local exigencies require; but by conclusion No. 2 the court says: "if it extracts water beyond present consumption it must pay for it."

Conclusion No. 1 implies there are no new duties or obligations imposed upon plaintiff in error; conclusion No. 2, that there are new duties. Conclusion No. 1 admits the soundness by implication of the Jersey City case, supra. Conclusion No. 2 repudiates it, and cites the Hudson County case, 209 U. S. 349, as its authority; but it overlooks however, the fundamental assumption made in that case, for at 354 it is said "The courts below assumed or decided, and we shall assume, that the defendant represents the rights of a riparian proprietor, and on the other hand, that it represents no special charter powers that give it greater rights than those."

Our charter rights differentiates the case at bar from the reasoning of the Hudson County case, supra.

Conclusions Nos. 3 and 4 contain the Court's positive reasons for the judgment reached below. No. 3 denies that a municipal corporation can own property in its private

capacity which is protected by the constitution of the United States against impairment by the state. The importance of No. 3 is obvious.

The majority of our republic have committed their comfort, happiness and welfare to the functions of local government, and the proposition pressing upon us is how to adjust these municipal conditions to the honor and glory of our republic. The career and genius of our race began in and has always been nourished and bound up with local government. The popular demand of today is for more functions for local government.

The court below held, in effect, that legislative authority given to a municipal corporation to purchase a water system from a private corporation which possessed an irrepealable charter, and which when purchased was to be held by the municipal corporation in all the amplitude of the franchises and rights of its predecessor, held it at the will of the state.

Conclusion No. 3 seems to us to be opposed to the opinions of this court which we have cited above. Those decisions we believe are sound and make for the orderly and natural development of one of the fundamental facts in our history, that our state is the outcome of our local government as our republic is of the state.

We think it a natural sentiment for the people of the community to aspire to own and control absolutely what they buy and pay for, for as was said by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, at 405, "Though any one state may be willing to control its operations, no state is willing to allow others to control them."

Conclusions Nos. 4, 5 and 6 may be considered together; they contain the reasons which the court below regarded as decisive for its judgment. The court implies that

because property is effected with a public interest the legislative power is so transcendent over such property that it is free from constitutional restraints.

Mr. Justice Moody in Honolulu v. Hawaii, 211 U. S. 282 at 290, in respect to the constitutional limitations said that "business effected with a public interest is subject within constitutional limits to governmental power of regulation."

Mr. Elihu Root in his brief in Muhlker v. Harlem Ry. Co., 197 U. S. 544 at 550 said, "The legislature cannot violate the constitution and redeem the violation by the claim that it was done for the 'public benefit.' A repudiation of a contract obligation is quite usually sought to be justified by the plea of the 'public benefit,' but the constitution of the United States may not be nullified in so simple and easy a fashion." In that case the Court of Appeals of New York had decided that the public interest was so compelling as to over-ride the effect of a grant to the municipality of the city of New York.

We differentiate the case at bar from the controlling principle of the cases of Union Dry Goods Co. v. Georgia P. S. Corp., 284 U. S. 372; Rail and River Coal Co. v. Ohio Industrial Comm. 236, U. S. 338; Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548; Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, and Chicago B. & Q. R. R. Co. v. McGuire, 219 U. S. 549 at 568. These cases were all decided upon the principle of the inalienable ight of the state to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction, as was said in the McGuire case, supra, but nevertheless the principle is qualified that the regulations should be designed to promote the health, comfort, safety or welfare of the community and that the regulations employed

should have real and substantial relation to the avowed or ostensible purpose of the legislation. (See Goldsboro case, supra, at 559).

Now the statute under consideration is not one to prevent waste of water. It is not to regulate the volume of water appropriate to the needs of the population of the community, for every community without regard to its population is to have the water free up to one hundred (100) gallons daily for each inhabitant as appears by the census of 1905 without paying for it any license fee. This case is devoid of any implication that the plaintiff in error was taking water in excess of its real necessities, and therefore the taking was clearly within its franchise or charter rights. If so, how can it be said that it is a police regulation to require the payment of money as a license fee under the conditions contained in this record? In Dakota Cent. Tel. Co. v. South Dakota, 250 U. S. 163 at 185 and 186, Mr. Chief Justice White called attention to the confusion of thought which arises from the two significations of the phrase "police powers;" the broader one embracing the whole field of state authority, and the other a narrower one including only the state powers to deal with health, safety and the morals of the people.

We submit that the provisions of this statute are not police regulations and that the court below drifted into error when it confessedly omitted to consider the charter and property rights of the plaintiff in error. See Atlantic Coast Line v. Goldsboro, supra, at 559, wherein this court said that the ordinance in question must be considered in view not only of the charter and property rights of the plaintiff in error, but of the actual situation that had developed and then existed in Goldsboro.

As was said by Mr. Justice McKenna in Los Angeles v. Los Angeles Gas Corp. 251 U. S. 39, "A franchise conveys rights and if their exercise could be prevented or destroyed by a simple declaration of a municipal council they would be infirm indeed in tenure and substance. It is to be remembered that they come into existence by compact, having, therefore, its sanction urged by reciprocal benefits, and are attended, and can only be exercised by expenditure of money, making them a matter of investments and property and entitled as such against being taken without the proper process of law—the payment of compensation." He further said at p. 38 "but there is some point where power or rights must prevail however plausible or specious the argument of either against the other may be." He further pointed out in that case that the city had the police function, but he asked in what way the public peace or health or safety was imperiled. The court reasoned and concluded that what the city did was done not in its governmental capacity—an exercise of the police power—but in its "proprietary or quasi-private capacity," and that the difference in these capacities is recognized and the difference in the attendant powers pointed out in the decisions of this court.

The legislature of the State of New Jersey conferred upon the "Trenton Water Works," the City of Trenton's predecessor in title, the privilege of taking all the water from the Delaware River required for its corporate purposes, and no attempt was made by the State to impose a fee for such privilege until the enactment of the statute involved in this litigation. For seventy years the privilege was exercised and enjoyed without any interference of any character by the state.

Can a license fee be now constitutionally

imposed for the privilege granted? If the state can impose a license fee of the character here imposed, it can at will, increase the fee to such an extent as to render the grant futile and of no value.

Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U. S. 84, is a case strongly in point. In that case this court held a municipal grant of the right to occupy city streets with the pipes of a water distributing system is, when accepted by the grantee, not a merely revokable right, but "is a substantial property right."

Mr. Justice Lurton said:

"It has all the attributes of property. It is assignable and will pass under a mortgage sale of the property and franchises of the company which owned it.*** The grant was made in contemplation of the investment of large capital in the construction of a system of water works for the permanent supply of the city with water. The presumption is that no such enterprise would have been entered upon if the street easement was subject to immediate revocation.*** The ordinance of June 7, 1906 imposes a rental charge called a license fee.*** The plain effect of this later ordinance was to impair the obligation of the contract resulting from the ordinance conferring the street easement."

In every case in which a license fee has been upheld, it will be found upon examination, we think, the privilege licensed was revokable at the will of the legislature. The privilege licensed in this case is not revokable.

It is submitted that the water plant owned and operated by the plaintiff in error came into existence by compact; that reciprocal benefits inured to the state and to the "Trenton Water Works" at the time the plant was estblished; that the enlargement and development of the plant, with its pumping stations,

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filtration and purification processes, reservoirs and distributing system of mains and pipes, represent the expenditure of millions of dollars, making the plant "a matter of investment and property which is entitled as such against being taken without the proper process of law—the payment of compensation." Los Angeles v. Los Angeles Gas Corp., supra

In conclusion it is respectfully asserted and urged here that the act of the legislature of the State of New Jersey of June 17, 1907, being Chapter 252 of the Laws of 1907 (as construed by our courts), offends against the constitution of the United States in the following particulars:

(a) It impairs the obligation of a charter contract existing between the State of New Jersey and the City of Trenton, the successor in title of the rights and privileges granted to the "Trenton Water Works," by the act of 1804 as supplemented by the act of 1852.

(b) It takes the property of the City of Trenton held in its private or proprietary capacity for public use with out the payment of compensation therefor, and

(c) It deprives the City of Trenton of such property without due process of law.

For these reasons it is respectfully submitted the judgment of the Court of Errors and Appeals of the State of New Jersey, here under review, should be reversed.

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# Supreme Court of the United States

**October Term, 1922**

**No. 430**

THE CITY OF TRENTON,
*Plaintiff in Error,*

vs.

THE STATE OF NEW JERSEY,
*Defendant in Error.*

# BRIEF OF DEFENDANT IN ERROR

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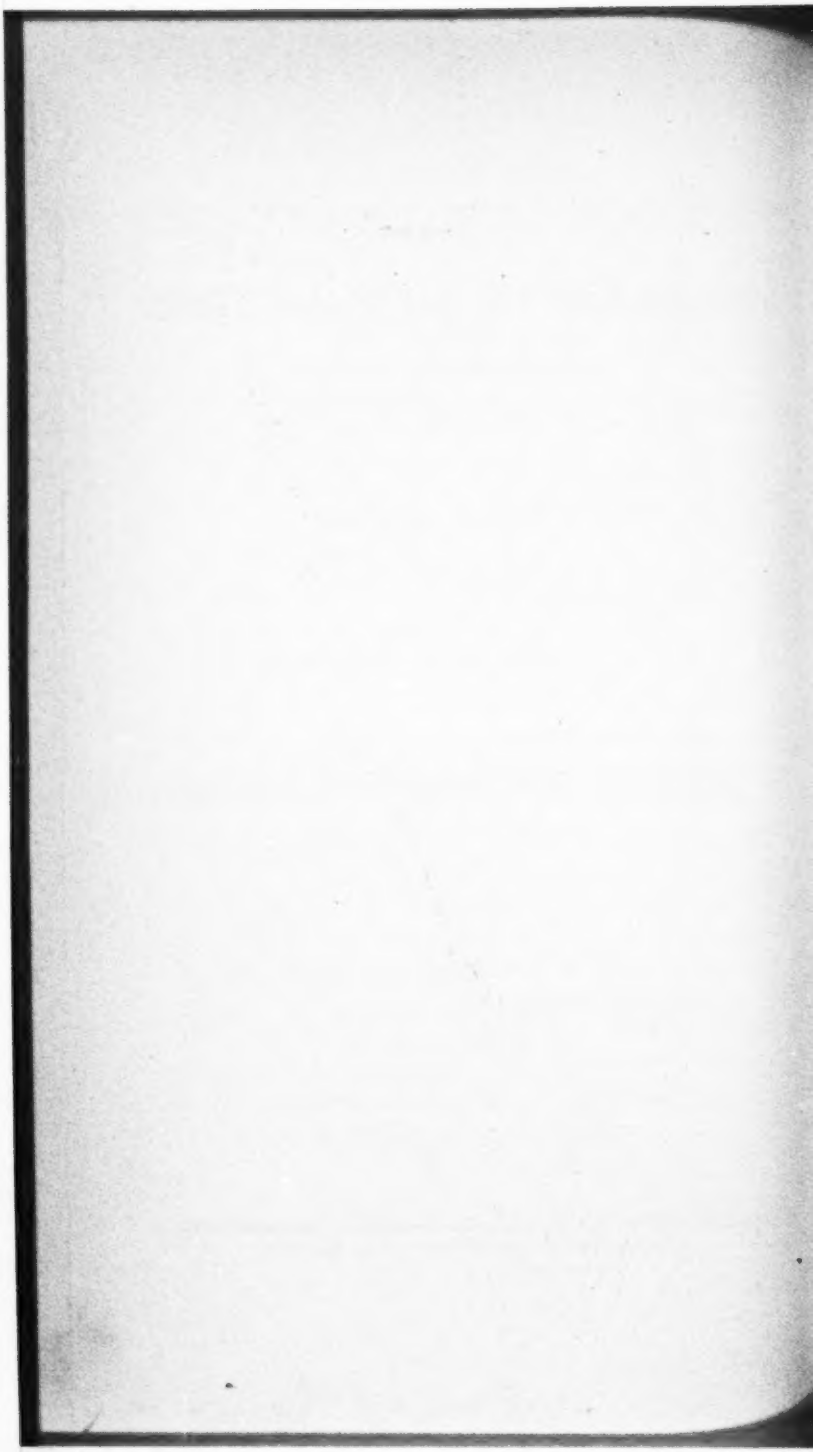

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# Supreme Court of the United States

**October Term, 1922**

**No. 430**

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THE CITY OF TRENTON, *Plaintiff in Error,*

*vs.*

THE STATE OF NEW JERSEY, *Defendant in Error.*

In Error, &c.

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## BRIEF OF DEFENDANT IN ERROR.

### STATEMENT.

This case comes before the United States Supreme Court from the Court of Errors and Appeals of the State of New Jersey, to review a judgment of that court affirming a judgment in the New Jersey Supreme Court striking out the defenses interposed by the City of Trenton, the Plaintiff in Error, and entering judgment for the amount sued for by the State for excess water diversion, under the provisions of Chapter 252 of the Laws of 1907, entitled "An act to establish a State water supply commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted," and the acts amendatory thereof and supplementary thereto.

It is the contention of the Plaintiff in Error that by virtue of the following acts of the Legislature they are not subject to the license fee imposed for the excess water diversion by the statute aforesaid, to wit:

(a) "An act to incorporate the proprietors of the Trenton Water Company," passed February 29, 1804 (p. 28, State of Case).

(b) A supplement to an act entitled "An act to incorporate the proprietors of the Trenton Water Company," passed March 24, 1852 (p. 29, State of Case).

(c) "An act to authorize and enable the City of Trenton to purchase a part or the whole of the capital stock of the Trenton Water Works Company," approved March 2, 1855 (p. 32, State of Case).

(d) "An act to authorize the President and Directors of the Trenton Water Works Company to convey their works and franchises to the City of Trenton, and to provide for the management of said works," approved March 1, 1859 (p. 34, State of Case).

(e) Articles of Agreement between the President and Directors of the Trenton Water Works and the Inhabitants of the City of Trenton, dated the seventh day of March, 1859, whereby the Water Company sold and the City of Trenton purchased the water works of the Water Company (p. 38, State of Case).

There are three Assignments of Error (p. 7, State of Case), the First Assignment being the allegation that the court erred in holding that section 8 of the act was constitutional, and not in violation of Article I, section 10, paragraph 1, of the Constitution of the United States, and did not impair the obligation of a charter contract existing between the State of New Jersey and the City of Trenton; and the Second and Third Assignments alleging error upon the part of the Court of Errors and Appeals in sustaining the constitutionality of the act, and holding that the act did not take the property owned by the City of Trenton for public use without just compensation and without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

An inspection of the statutes relied upon by the Plaintiff in Error discloses that the first act was the act by which the Trenton Water Works was created, and this act simply constituted a corporation and permitted the said corporation to lay and extend their aqueduct through such of the

streets of the city as may be necessary, conferred power upon them to exercise corporate powers and dispose of water.

In 1852 the power of the Trenton Water Works was extended to take the water which they might require there in part or in whole from the Delaware River, and to that end they were invested with all the powers necessary to enable them to purchase and hold such real estate, and to construct, keep up, and maintain such reservoirs, aqueducts, and apparatus for elevating water, and such erections in the Delaware River, not obstructing the navigation thereof, &c., as more particularly appears from an inspection of section 1 of the act (p. 29, State of Case). Power was also given to lay pipes, &c., and existing rights of the corporation were continued.

The preamble to the said act discloses that the prior source of supply from the time of the incorporation of the said company was from springs.

There is nothing in the entire act which discloses the legislative intent to confer any exclusive right upon the said Water Company, or to exempt it from any future regulation, or the imposition of a tax or license fee.

Subsequent acts authorized the corporation to sell, and the municipality to buy, and as a result thereof the agreement referred to in paragraph (e) was entered into, and the municipality has continued to supply the inhabitants of the City of Trenon from the time of the acquisition of the said water plant up to the present time, extending its mains, reservoirs, &c.

The contention of the Plaintiff in Error is that the contract between the President and Directors of the Trenton Water Works, acquired by the Inhabitants of the City of Trenton, creates a sacred and inviolable contract between the State of New Jersey and the Trenton Water Works, and their successors in title, and for that reason the Inhabitants of the City of Trenton are exempt from the operation of section 8 of the law in question. Second, that the City of Trenton is holding the lands, tenements, hereditaments,

real estate, and other properties in its proprietary capacity, and for that reason the imposition of a license fee for the excess diversion of water is in violation of the Fourteenth Amendment.

The original suits were brought under the provisions of Chapter 252 of the Laws of 1907, entitled "An act to establish a State water supply commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted," approved June 17, 1907, a copy of which is annexed to this brief and marked "Schedule A."

## Point I.

### The Act in Question is the Expression of the Legislative Policy to Conserve the Waters of the State for Public Use.

The title of the act is expressive of the legislative intent, to wit, the establishment of a State water supply commission (now Department of Conservation and Development), the defining of its powers and duties, and the conditions under which waters of this State may be diverted. The act was passed in the interests and for the protection of the public. The charge for excess diversion upon which the suits are founded is expressly stated by the statute to be a license. Nowhere in the act is there a prohibition of the use of water. The payment of excess charges legalizes the excess diversion. The delegation or grant of power to the State Water Supply Commission, now continued in the Board of Conservation and Development, is a grant of a part of the State's sovereignty, to be exercised by the designated agents in the interest and for the welfare of the whole sovereignty and all its people.

It is a well-established principle that the State is charged with the public duty and interest in the conservation and control of the use of the water, the title to the same being in the State as sovereign, as trustee for the public, holding it for common use and benefit. Blackstone aptly stated the principle upon which this is founded, as follows:

> "Water is a movable, wandering thing, and must of necessity, continue common by the law of nature; so that I can have only a temporary, transient, usufructuary property therein."
>
> *2 Black. Com.* 18.

In *Cobb* v. *Davenport*, 32 *N. J. L.*, at page 378, Justice Depue said:

> "The policy of the common law is to assign to everything capable of ownership a certain and determinate owner. If capable of occupancy and susceptible of private ownership and enjoyment, the common law makes it exclusively the subject of private ownership; but if such private ownership and enjoyment are inconsistent with the nature of the property, the title is in the sovereign, as trustee for the public, holding it for common use and benefit."

Chancellor Pitney, speaking for the Court of Errors and Appeals in *McCarter, Attorney-General*, v. *Hudson County Water Company*, 70 *N. J. Eq., p.* 695, in construing the act of 1905, which forbade diversion from the State of the waters of lakes and streams:

> "It must, we think, be sufficiently obvious that the government established in this State by and for the people thereof has complete dominion (subject only to constitutional limitations), over all things within the borders of the State, including all lands and waters, and the mode of acquiring and disposing of rights of property therein. The fresh-water lakes, ponds, brooks and rivers, and the waters flowing therein, constitute an important part of the natural advantages of this territory upon the faith of which its population has multiplied in numbers and increased in material and moral welfare. The regulation of the use and disposal of such waters, therefore, if it be within the powers of the State, is among the most important objects of government."

In the same case, taken by writ of error to the Supreme Court of the United States, Mr. Justice Holmes, speaking for that court, 209 *U. S.* 349, said:

> "It appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interests of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purposes of turning them to a more perfect use. This public interest is omnipresent wherever there is a State and grows more pressing as population grows.

Similar views are to be found in *Paterson* v. *East Jersey Water Company*, 74 *N. J. Eq., p.* 49, affirmed, 77 *N. J. Eq., p.* 588, and *Wilson, Attorney-General*, v. *East Jersey Water Company*, 78 *N. J. Eq., p.* 329.

In the case of *Collingswood* v. *Water Supply Commission*, 84 *N. J. L., p.* 110, the legislative intent was recognized by the Supreme Court in construing the legislation pertaining to the subject-matter, wherein it said, Justice Parker writing the opinion, after discussing all of the legislation upon the subject-matter from 1882 up to the time of the consideration of this case:

> "It is quite evident, therefore, that the policy of the State is one of determination to conserve, and as we view the matter, to economize to the fullest extent that is reasonable, the water resources of the State for the benefit of all its inhabitants. The growing scarcity of water supply is a matter of common knowledge, and a great deal of the fiercest litigation in the courts at the present time arises out of disputes over the ownership of water rights. Consequently, in looking at the acts of 1907 and 1910, this policy should be kept in mind; though indeed this is hardly necessary in view of the language of those very acts, for the act of 1907 in its very first section says that the State

> Water Supply Commission 'shall be charged with a general supervision over all the sources of potable and public water supply to the end that the same may be economically and prudently developed for the use of the people of this State.'"

Again on page 111, the court says:

> "The general effect of this legislation is to invest the Commission as a State agency, with the fullest control over prospective drafts by municipalities, corporations, or private persons upon either surface or sub-surface supplies of water within the jurisdictions and boundaries of the State; to charge it as such agency with the duty of prudently and economically dealing with the supply so as best to subserve the interests of the people of the State at large, and not the interests of any particular locality; and to vest in the Commission a judicial discretion with regard to permitting municipalities to draw upon that water supply, such discretion to be exercised within the limits laid down by the statute, and subject to review by the courts for 'reasonableness, legality and form.'"

In consonance of this policy of the State, an examination of section 8 of the act in question discloses the legislative intent to impose a license fee for the excess diversion of the water, at the same time preserving unto municipalities and water companies the right to use the water legally being diverted by them at the time of enactment of the act. Such legal diversion being fixed, and no payment required until it shall exceed a total amount equal to one hundred gallons daily per capita for each inhabitant of the municipality or municipalities supplied, as shown by the census of 1905.

The term "now being legally diverted," was construed in the cases of *East Jersey Water Company* v. *Board of Conservation and Development* and *Acquackanonk Water Company v. Board of Conservation and Development*, 91 *N. J. L., p.* 488. In those cases the companies made the same

contention as is now being made by the plaintiff in error, to wit, that when the original act went into effect, the companies were under contract to supply certain municipalities with whatever quantities of water they from time to time required, and to pump and filter all the water used by the other water companies which were under contract to furnish and supply the water to certain municipalities, and that the excess water diverted by them was not subject to license fee so long as the diverted water is required to fulfill the contracts.

Mr. Justice Bergen, writing the opinion for the New Jersey Supreme Court, said:

> "This construction will make the statute inefficacious because the growing demands of the different contracting municipalities for water may take the entire flow of the Passaic River, and ought not to be adopted unless required by the statute in plain terms. The statute requires payment 'for all such water hereafter diverted in excess of the amount now being legally diverted,' with the proviso that no payment be required until the legal diversion shall exceed one hundred gallons per day per capita. We are of opinion that 'legally diverted' means not a future diversion, but one now being exercised under a legal right, and that under this statute a legal abstractor may take what he was diverting in 1907, and, if that did not reach the statutory maximum of exemption, as much more as is required to make the total diversion one hundred gallons per day per capita for each of the municipalities supplied, without payment of the license fee."

The constitutionality of the act in question and the right of the State to collect the excess diversion license fee have been sustained by the New Jersey courts in the following cases: *East Jersey Water Company* v. *Board of Conservation and Development*, and *Acquackanonk Water Company* v. *Board of Conservation and Development*, 91 *N. J. L.*, p.

448; *Society for Establishing Useful Manufactures* v. *Board of Conservation and Development et al.*, 101 *Atl. Rep., p.* 1025; *Collingswood Sewerage Company* v. *Collingswood*, 92 *N. J. L., p.* 511; *State* v. *Mayor and Aldermen of Jersey City*, 94 *N. J. L.* 431, affirming the judgment of the Supreme Court.

There is no attempt upon the part of the State by this legislation to interfere with any contractual status, with any vested rights acquired by them under the charter of the Trenton Water Works. On the contrary, the act recognizes their right to extract water from their water supply, or such additional supply as they might obtain under the provisions of the act, and to continue to extract a supply according to the necessity and demands of their inhabitants. Therefore, by this legislation, beginning with the act of 1907 and all subsequent acts adopted thereafter, in accordance with the same policy, there are no property rights impaired, or limitation placed upon the exercise of any of the powers which they may possess under the grant.

## Point II.

**The Act in Question is a Regulation Under the Police Power of the State to Secure Public Safety, and for that Reason is Constitutional.**

It must be conceded that the Fourteenth Constitutional Amendment does not limit the subjects upon which the police power of a state may be lawfully exerted. *Jones* v. *Brian*, 165 *U. S., p.* 180; *Davis* v. *Mass.*, 167 *U. S.* 47.

In *New York and New England R. R. Co.* v. *Briston*, 151 *U. S.* 556, Chief Justice Fuller laid down the doctrine, speaking for the court, as follows:

> "It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of prop-

erty without due process, or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."

Citing, *Beer Co.* v. *Massachusetts*, 97 *U. S.* 25; *Fertilizing Co.* v. *Hyde Park*, 97 *U. S.* 659; *New Orleans Gas Company* v. *Louisiana Light Company*, 115 *U. S.* 650; *Mugler* v. *Kansas*, 123 *U. S.* 623; *Budd* v. *New York*, 143 *U. S.* 517.

This principle was reiterated by this court in the case of the *Northern Pacific Railway* v. *Duluth*, 208 *U. S.*, *p.* 596.

The police power embraces every law which concerns the welfare of the whole or any part of the people of the State, whether it relates to their rights or duties; whether it relates to them as men or citizens of the State; whether in their public or private relations; whether it relates to the rights of persons or property of the whole people of the State or of any individual within it, and operates upon the persons and things within it. *New York* v. *Miln*, 11 *Pet.* 102.

Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State and within legislative control, in the exercise of which the Legislature is vested with a large discretion beyond the reach of judicial inquiry, if it is exercised *bona fide* for the protection of the public. *Louisville & N. R. R. Co.* v. *Kentucky*, 161 *U. S.* 677.

Notwithstanding the contracts relied upon by the Plaintiff in Error, it is a well-settled principle of law that the right of contract is subject to limitations which the State may lawfully impose in the exercise of its police power. *Holden* v. *Hardy*, 169 *U. S.* 366.

This principle was recognized and enforced in *Chicago, Burlington and Quincy R. R. Co.* v. *Chicago*, 166 *U. S.* 226, where it was held that the expenses incurred by the railroad company in erecting gates, planking at crossings, etc., and the maintenance thereof, in order that the road might be safely operated, must be deemed to have been taken into account when the company accepted its franchise from the State, and the expenses incurred by the railroad company, though upon new streets, might be required as essential to the public safety.

In *Detroit Railroad Co.* v. *Osborne*, 189 *U. S.* 383, it was held that the State of Michigan might compel a street railroad to install safety appliances at an expense to be divided with a steam railroad occupying the same street, notwithstanding the steam railroad was the junior occupier of the street.

In *New Orleans Gas Light Co.* v. *Drainage Commission of New Orleans*, 197 *U. S.* 453, it was held that although the gas company had permission from the city to lay its pipes under the streets, it might be required to remove the same at its own expense, in the exercise of the police power in the interest of the public, in order to make way for a system of drainage which was required, in the interest of the public health, without compensation to the gas company; and that uncompensated obedience to regulations for public safety under the police power of the State was not a taking of property without due process of law.

The same principles were recognized in *Chicago, Burlington and Quincy Ry. Co.* v. *People of the State of Illinois ex rel. Drainage Commissioners*, 200 *U. S.* 561; in *Union Bridge Co.* v. *United States*, 204 *U. S.* 364.

The court in *Northern Pacific Railway Co.* v. *Duluth*, 208 *U. S.* 583, in citing these cases, said:

> "The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompen-

> sated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution."

The contention of the Plaintiff in Error that at the time when the grant was made to the Trenton Water Works the Legislature divested itself of its right under its police power to impose the license in question, is without merit, as it is a well-established principle in law that "the Legislature cannot, by any contract, divest itself of the power to provide for the protection of the lives, health and property of citizens and the preservation of good order and public morals. All rights, including those under charters, are held subject to the police power of the State." *Stone* v. *Miss.*, 101 *U. S.* 814.

The State can no more abdicate its trust over property in which the whole people are interested than it can abdicate its police powers in the administration of government and the preservation of peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but their always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character; they cannot be placed entirely beyond the direction and control of the State. *Illinois Cent. R. R. Co.* v. *State of Illinois*, 13 *Sup. Ct. Rep.* 118.

In the case of *Anthony Falls Water Power Co.* v. *Board of Water Commrs.*, 18 *Sup. Ct. Rep.* 166, the court had under consideration the words of certain grants made to companies by charters. The court there said:

> "There was no contract by virtue of these charters that the companies should always and for all time be entitled to all the natural flow of the water in the river without regard to the right of the State. The claim made by the companies seems to us most extravagant. The State, or any particular subdivision thereof, acting under its

> authority, would, if these claims were valid, be forever thereafter prevented from using any portion of the waters of the river for any public purpose, unless compensation for such use were first made. The construction of the meaning of the charters assumes the power of a territorial or State legislature to bind future legislatures in dealing with these public rights, and it prevents the latter from providing for the use of any portion of the waters for public purposes of the most important character without first making compensation to the plaintiffs for that use. If we should assume the validity of an act of the legislature of such a character (which, under the decision of this court in *Illinois Central R. R. Co.* v. *Illinois*, 146 *U. S.* 387, is at least doubtful), it is clear that we ought not to adopt a construction leading to that result unless the legislative act be plain beyond all doubt. We are of the opinion that these particular charters of the plaintiffs are not to be thus construed."

In the case of *Hudson County Water Company, Plaintiff in Error*, v. *Robert H. McCarter, Attorney-General of the State of New Jersey*, 209 *U. S.* 349, Mr. Justice Holmes, writing the opinion for the court, speaking of the police power of the State, said:

> "All rights tend to declare themselves absolute to their logical extreme, yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line or helping to establish it,

are fixed by decisions that this . that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

"It sometimes is difficult to fix boundary stones between the private right of property and the police power, when as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the State, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned."

Further in the opinion he says:

"We are of the opinion further that the constitutional power of tne State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculations as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an æsthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will. The defense under the

> Fourteenth Amendment is disposed of by what we have said."

Mr. Justice Magie, speaking for the Supreme Court in *State* v. *Wheeler*, 44 *N. J. L.* 91, involving the construction of an act designed to protect the waters, creeks and ponds of the State from pollution, said:

> "The design of the act is not to take property for public use, nor does it do so within the meaning of the constitution. It is intended to restrain and regulate the use of private property so as to protect the common right of all the citizens of the State. Such acts are plainly within the police power of the legislature, which power is the mere application to the whole community of the maxim, *'sic utere tuo, ut alienum non laedas.'* Nor does such a restraint, although it may interfere with the profitable use of property by its owner, make it an appropriation to a public use so as to entitle him to compensation."

## Point III.

**Grants of Franchises and Special Privileges Are to be Construed in Favor of the Government.**

There is nothing in the legislation relied upon by the Plaintiff in Error to indicate that the State at any time intended to surrender its right under its police power to regulate the use of the water. The original legislation only gave the right to the Water Company to draw water from springs and lay pipes to convey it through the City of Trenton. The act of 1852 merely gave it the right, by reason of the inadequacy of the then source of supply, for the Water Company to draw additional water in whole or in part from the Delaware River. No exclusive privilege was conveyed, no covenant upon the part of the State that the exercise of this right would exempt the Water

Company or its successor from either taxation or a license fee, nor from regulation under the police powers of the State under its policy to conserve water. If such a promise had been intended, it was far too important to be left to implication, and for that reason there can be no constitutional violation of any of the rights possessed by the municipality as the successor of the Trenton Water Company.

In the case of *Knoxville Water Company* v. *Mayor and Aldermen of the City of Knoxville*, 26 *Sup. Ct. Rep., p.* 224, which involved the question as to whether or not the Water Company had obtained an exclusive grant to maintain water works in that city, Justice Harlan, in writing the opinion for the court, reviewed exhaustively the decisions upon the subject-matter. He there said:

> "We may assume, for purposes of the present discussion, but without deciding, that the city of Knoxville was invested by the legislature with full authority, or that, under its general municipal powers, it could bind itself by contract, to give to a single corporation or company the exclusive right, for a specified period, to supply water for the use of itself and its inhabitants. It will yet be conceded that whatever authority it possessed in this matter was granted solely for the public good, and that in every substantial, legal sense the agreement with the water company is to be deemed a public grant, entitling that company to exercise certain public functions that appertain to the city as a municipal corporation.
>
> "Although the doctrines which must control in determining the scope of such a grant are clearly settled and are familiar, it may be well to recall the words of some of the adjudged cases. In *Charles River Bridge* v. *Warren Bridge*, 11 *Pet.* 420, the doctrine announced was that government, possessing powers that affect the public interests, and having entered into a contract involving such interests, is not, by means merely of implications

or presumptions, to be disarmed of powers, necessary to accomplish the objects of its existence; that any ambiguity in the terms of such a contract must operate against the corporation, and in favor of the public, and the corporation can claim nothing but what is clearly given by the act; that it can never be assumed that the government intended to diminish its powers of accomplishing the ends of its creation; and that those who insist that the government has surrendered any of its powers, or agreed that they may be diminished, must find clear warrant for such a contention before it can be heeded.

" 'Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public.' Such were the words of this court in *St. Clair County Turnpike Co.* v. *Illinois*, 96 *U. S.* 63.

"The universal rule in doubtful cases—this court said in *Oregon R. & Nav. Co.* v. *Oregonian R. Co.*, 130 *U. S.* 1, is that 'the construction shall be against the grantee, and in favor of the government.' As late as *Coosaw Min. Co.* v. *South Carolina*, 144 *U. S.* 550, this court said: 'The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government of the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. This principle, it has been said, 'is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.' *Slidell* v. *Grandjean*, 111 *U. S.* 412. We have never departed from or modified

these principles, but have reaffirmed them in many cases."

*United States* v. *Arredondo*, 6 *Pet.* 691.
*Mills* v. *St. Clair County*, 8 *How.* 581.
*Richmond F. & P. R. Co.* v. *Louisville R. Co.*, 13 *How.* 81.
*Dubuque & P. R. Co.* v. *Litchfield*, 23 *How.* 66.
*Newton* v. *Mahoning County*, 100 *U. S.* 561.

## Point IV.

**The Plaintiff in Error, Being a State Agency, Cannot Possess a Contract Which May Not be Changed, Modified or Regulated by the State.**

The legislative grants under which the plaintiff in error claims the right to divert water without limit and without the payment of the tax imposed, was an exercise of the sovereign power of the State, subject to the reserve power of the sovereign to repeal, alter or modify the grant. There is no attempt in the act of 1907 to impair the grant by prohibiting the municipality from drawing the water that is necessary to supply the inhabitants of the municipality with an adequate water supply, but in line with the policy of the State to conserve the water and to preserve it for the common good of the entire public of the State, the license imposed is a license upon the limitation fixed by the reserve power of the State after a careful calculation of what would be adequate to supply the inhabitants of the respective municipalities. The limitations fixed by the statute only begin when the legal diversion shall exceed one hundred gallons per day per capita, and it is only upon the excess thereof that the license fee applies. The municipality was created by the Legislature, and is an arm of the State to serve the general public. The Legislature that creates has the right to modify, change and impose conditions from time to time upon its creatures, and it would be strange, indeed, if the State, which has power to terminate the existence of the

municipalities created by it whenever it may see fit, could not revoke authority granted by it to them, and, in the exercise of its sovereignty, cancel conditions which it had permitted them to impose upon other classes of corporations, which had also been created by it. *Collingswood Sewerage Co.* v. *Collingswood*, 92 *N. J. L., p.* 511.

In the above case, Mr. Justice Bergen, writing the opinion of the Supreme Court, said:

> "The ordinance was the legislative act of the municipality. As a legislative act, it was subject to the control of the legislature itself, and that body could make changes as long as it did not infringe the rights of the sewerage company, arising under the ordinance. It makes little difference whether we say that the ordinance created by way of legislative grant a property right called a franchise, protected by the Fourteenth Amendment, or a contract protected by the contract clause of the Federal Constitution and our own State Constitution. In either case, the question is whether a municipal corporation, an agency of the State, is protected by either the Fourteenth Amendment or the contract clause. It is well settled that such protection does not extend to the rights of the municipal corporation against its own creator."

Citing *Rader* v. *Southeasterly Road District*, 36 *N. J. L.* 273.

In the latter case, Mr. Justice Depue said:

> "The power of the Legislature over corporations created for purposes of local government is supreme. From a grant of this character, no contract arises with the corporators which exempts it from legislative control. The Legislature may alter, modify or repeal the charter at any time in its discretion. The only limitation on the operation of such repeal is as to creditors, that it shall not operate to impair the obligation of existing contracts, or deprive them of any remedy for en-

> forcing such contracts which existed when they were made."

In the case of *New Orleans* v. *New Orleans Water Works*, 142 *U. S.* 79, the United States Supreme Court laid down the following principle:

> "Public corporations, such as counties, towns and cities, are not within the principle that renders laws impairing contracts unconstitutional, but the Legislature may modify or destroy them as the public good requires."

The same principle was upheld in the case of *Barnes* v. *District of Columbia*, 91 *U. S.* 540.

In the case of *Laramie County* v. *Albany County*, 92 *U. S.* 307, where it was held that the Legislature had power to diminish or enlarge the area of the county, whenever the public convenience or the necessity required, Mr. Justice Clifford said:

> "Institutions of this kind, whether called counties or townships, are the agencies of the State in the important business of municipal rule and cannot have the least pretentions to sustain their privileges or their existences from either right, a contract between them and the Legislature of the State, because there is not, and cannot be, any reciprocity or stipulation, and their objects and duties are utterly incompatible with everything of the nature of contract."

So, in the case of *Williamson* v. *New Jersey*, 130 *U. S.* 189, it was held that "the power of taxation upon the part of a municipal corporation is not private property or a vested right in property in its hand, but the conferring of such power is an exercise by the Legislature of a public and governmental power which cannot be imparted in perpetuity, and is always subject to revocation, modifications and control, and is not the subject of contract." Mr. Justice Blatchford saying:

> "We are clearly of the opinion that such a grant of the power of taxation by the Legislature of a

> State does not form such a contract between the State and the township, as is within the protection of the provisions of the Constitution of the United States, which forbids the passage by a State of a law impairing the obligation of contracts."

In the case of *Board* v. *Shinkle,* 140 *U. S.* 334, it was held, the Chief Justice speaking for the court:

> "That an executive agency created by a State for the purpose of making public highways and empowered to assess the costs of its improvements upon adjoining lands and to purchase such lands as were delinquent in the payment of the assessment, would not by such purchase acquire a contract right in the land so bought which the State could not modify without violating the provision of the Constitution of the United States."

The plaintiff in error, however, contends that there is a difference between its interest as a political subdivision and an interest as a proprietor, and that therefore they come within the protection of the clauses of the Constitution invoked. The principle, however, in the case of *Munn* v. *Illinois,* 94 *U. S.* 113, applies, to wit:

> "Property does become clothed with a public interest, when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public, for the common good, to the extent of the interest he has thus created."

This doctrine has been adopted by the United States Supreme Court and by the State courts. As was said in the case of *Smith* v. *Texas,* 233 *U. S.* 630:

> "The State under its power to enact laws for the general welfare of its people, may pass laws designed to increase the industries of the State, develop its resources, and add to its wealth; for

instance, laws forbidding any waste of natural gas or water, which would be detrimental to the public as distinguished from an injury to an individual."

Even the Supreme Court of the United States recognized this distinction in the *Dartmouth College Case*, 4 *Wheat.* 518, relied upon by the plaintiff in error, in which the inviolability of private charters was first asserted, a distinction being drawn in the opinion of Mr. Justice Washington between corporations for public government and those for private charity. He there said, "that the former are to be governed by the law of the land and the corporation may be controlled and its constitution altered and amended by the government in such manner as the public interests might require." He further said: "Such legislative interferences cannot be said to impair the contract by which the corporation was formed, because it is in reality but one party to it." Mr. Justice Story, in the same case, was also of the opinion (p. 694) that "corporations for mere public government, such as townships, cities and counties, may in many respects be subject to legislative control."

## Point V.

**The Plaintiff in Error is the Agent of the State in Serving the Inhabitants of the Municipality with Water Under the Charter Granted to the Trenton Water Works.**

The contention of the Plaintiff in Error that the act in question interferes with vested rights acquired by it as proprietary owners and not as a political subdivision of the State, is, as is well stated by the Court of Errors and Appeals, a misconception. The municipality is a portion of the State government. It was created by the sovereign power for the purpose of exercising the governmental functions within the territorial limitations created by the charter. It was a delegation of the authority of the State power to

perform, within its corporate limits, those functions which could not by very reason of the public duties thrust upon the sovereign power, be performed and exercised by the State itself. The right to take over and purchase the water works and to increase the existing plant was only a delegated authority of the State, permitting the municipality to exercise this power as the agent of the State. The power to create, the power to exercise, as delegated by the sovereign power, implies the right to control and to regulate.

As has been said in another portion of this brief, the rights of the municipality are not under the charter, but under the delegated power of the State, which at no time could grant away the common property of the public in the waters of the State, and the cases relied upon by the Plaintiff in Error in principle do not apply to the case at bar.

That portion of the decision, cited by counsel in his brief, of the case of *State* v. *Jersey City*, 94 *N. J. L., p.* 431, was merely dicta. That case was a similar case to the case at bar, and were it not for the dicta contained in that case, neither the City of Trenton nor the City of Newark would have ever contested the suit brought by the State for the collection of the unpaid license fees under the act. This particular portion of the decision was brought before the Court of Errors and Appeals at the time of the argument of the cases; therefore, the court had full knowledge of the contention of Plaintiff in Error, notwithstanding which the court affirmed the judgment of the court below in the very able opinion filed in that case. The Jersey City case did not have this question before it. The cases of the City of Newark and the City of Trenton, which were argued jointly before the Court of Errors and Appeals, raised the question of the effect of a grant by the State. There is nothing in this case that shows a direct grant to the City of Trenton. Whatever rights it acquired were under the delegated authority to purchase the property belonging to the Trenton Water Works, which had been permitted to supply the inhabitants of the City of Trenton with water from springs originally, and subsequently by taking such addi-

tional water in whole or in part from the Delaware River.

The case at bar is to be distinguished from the cases cited by counsel, relying, as he does, upon cases which involve provisions of private charters containing non-tax or limited tax provisions, particular attention being called to the following cases:

The case of *Vilas* v. *City of Manila*, 220 *U. S.* 345, cited in plaintiff's brief, was a case involving the question whether a creditor of the municipality, while it was under Spanish regime, could institute a suit against the municipality after the adoption of the Treaty with Spain and the establishment of the government of the municipality under American jurisdiction.

The Court there held that the rights of the creditor could not be impaired by the change; that the new municipality having taken over all of the assets of the old municipality could not escape any liabilities against the old municipality, the Court there saying:

> "Was corporate identity and corporate liability extinguished as a necessary legal result of the new charter granted in 1901 by the Philippine Commission? The inhabitants of the old city are the incorporators of the new. There is substantially identity of area. There are some changes in the form of government and some changes in corporate powers and methods of administration. The new corporation is endowed with all of the property and property rights of the old. It has the same power to sue and be sued which the former corporation had. There is not the slightest suggestion that the new corporation shall not succeed to the contracts and obligations of the old corporation. Laying out of view any question of the constitutional guarantee against impairment of the obligation of contracts, there is, in the absence of express legislative declaration of a contrary purpose, no reason for supposing that the reincorporation of an old municipality is in-

> tended to permit an escape from the obligations of the old, to whose property and rights it has succeeded. The juristic identity of the corporation has been in nowise affected, and in law, the present city is in every legal sense the successor of the old. As such it is entitled to the property and property rights of the predecessor corporation, and is, in law, subject to all of its liabilities." *Broughton* v. *Pensacola,* 93 *U. S.* 266; *Mount Pleasant* v. *Beckwith,* 100 *U. S.* 520; *Mobile* v. *Watson,* 116 *U. S.* 289; *Shapleigh* v. *San Angelo,* 167 *U. S.* 646, 655.

The case of *New Jersey* v. *Yard,* 95 *U. S.* 104, cited by counsel for the Plaintiff in Error, likewise does not apply in this case. In this case the Court had before it a charter to a railroad in which the Legislature as a consideration for the construction of the road agreed that the tax shall be fixed at one-half of one per cent. The Court there said:

> "Can it be believed that it was intended by either party to this contract that, after it was signed by both parties, one was bound forever, and the other only for a day? That it was intended to be a part of the contract that the State of New Jersey was, at her option, to be bound or not? That there was implied in it, when it was offered to the acceptance of the company, the right on the part of the Legislature to alter or amend it at pleasure? If the State intended to reserve this right, what necessity for asking the company to accept in such formal manner the terms of a contract which the State could at any time make to suit itself?"

The case of *South Carolina* v. *U. S.,* 199 *U. S., page* 437, does not apply, the question involved in that case being the right of the State of South Carolina to claim exemption from the payment of the Internal Revenue Tax imposed by the Federal Government for the sale of liquor. The Court there held that the exemption given to states and

municipalities does not apply, because when a State enters into a private enterprise not under the police power but as a business proposition, it is in the same category as any other private corporation.

The case of *Singer Manufacturing Company* v. *Heppenheimer*, 58 *N. J. L.* 633, is a case similar to *Yard*, v. *New Jersey*, the contest being over a provision in the charter of the Singer Manufacturing Company, wherein the State agreed in consideration of the Singer Manufacturing Company investing $500,000 in the erection of a manufacturing plant in the State of New Jersey it would be exempt from taxation; in violation of this provision of the contract, a tax was levied and certified through the State Comptroller. Suit was brought, and the Court there held that the consideration being the expenditure of the money and the Singer Manufacturing Company having acknowledged thereon that such a contract was entered into between the State and the Singer Manufacturing Company that a tax could not be imposed in violation of the terms thereof.

Even if the contention of the plaintiff in error were correct, the right to draw the water from the Delaware river was not part of the original franchise, but was a subsequent grant made in the year 1852. The Constitution of the State of New Jersey adopted by the people in 1846, and the corporation laws enacted, reserve the power in the sovereign to alter, amend or repeal. The grant to the water company for this addition privilege was impressed with this reservation in the sovereign, which could not be bartered away by any subsequent Legislature.

The Court of Errors and Appeals of the State of New Jersey therefore aptly said:

> "But the logical, and as it seems to us, conclusive answer to the defendants' contention, is that they are not only subsidiary political divisions of the State, exercising their delegated powers presumably and exclusively in the public interest, but ex necessitate their business and property, are thereby expressly affected with a public interest; and

under well-settled rules of law become thereby subject to the exercise of the police power when exerted by the State in behalf of the general body politic."

## Point VI.

### Summary.

It is respectfully submitted that the statute in question under which the judgment was obtained against the plaintiff in error is not violative of any sections of the Constitution invoked by the plaintiff in error; that it neither impairs the obligation of a contract nor the due process of law; nor the taking of private property for public use without compensation; that the legislation and the imposition of the license fee upon the excess diversion of water is a valid exercise of the police powers of the State for the benefit of the public, and that therefore the constitutionality of the act should be upheld, the judgment affirmed, and the Writ of Error dismissed.

THOMAS F. McCRAN,
Attorney-General of the State of New Jersey,
WILLIAM NEWCORN,
Assistant Attorney-General,
*Attorneys and of Counsel, State of New Jersey, Defendant in Error.*

## SCHEDULE "A."

AN ACT to establish a State Water-Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The Governor, by and with the advice and consent of the Senate, shall appoint five citizens of this State to constitute a commission to be known as the State Water-Supply Commission. The commission shall make necessary rules and regulations for the performance of its duties. It shall be charged with a general supervision over all the sources of potable and public water-supply, to the end that the same may be economically and prudently developed for the use of the people of this State.

2. No municipal corporation, corporation or person engaged in supplying or proposing to supply the inhabitants of any municipal corporation with water, shall have power to condemn lands or water for any new or additional source of water-supply, or to divert water from such new or additional source until such municipal corporation, corporation or person has first submitted descriptions thereof, which may be accompanied by maps and plans, to said commission, and until said commission shall have approved the same; *provided,* nothing in this section shall be interpreted to restrict any municipality in acquiring, by purchase or condemnation, any existing or operating water works supplying said municipality with water; *and provided, further,* that where any such municipal corporation, corporation or person has already acquired lands or water, and has in good faith commenced the construction of works for such new or additional water-supply, this section shall not apply to construction or lands or water necessary to complete such works, or to put in use such water-supply, if maps,

plans and descriptions of such lands, works and water-supplies shall be filed with the commission within ninety days of the approval of this act. Nothing in this act contained shall be construed to take from any municipality in this State the right to use and take all the water which it has the right to use or appropriate by purchase or condemnation.

3. Any municipal corporation, corporation or person may make application, by petition in writing, to the said commission for the approval of its plans for obtaining such new or additional source of water-supply, which application shall show the sources of the proposed supply, the approximate location of the proposed reservoirs or other works, with their estimated capacities, an abstract of any official reports relating to the same, and showing the need for an added supply, and the reasons for the choice made. The commission shall thereupon give notice, by advertisement in one or more newspapers published in the vicinity, of a public hearing, at which all persons or municipalities affected by the proposed plans may be heard for or against the granting of the application. After due hearing, the commission shall decide whether the plans proposed are justified by public necessity or reasonably anticipated public use, and whether such plans interfere unduly with the opportunity of other municipalities to obtain a water-supply by the taking of waters necessary for their use, or whether the reduction of the dry-season flow of any stream will be caused to an amount likely to produce unsanitary conditions or otherwise unduly injure public or private interests. Such commission shall, within ninety days after receiving the application, and with all convenient speed, either approve such application, reject it entirely, or approve the same subject to such reasonable terms and conditions as the commission may prescribe. The decision of the commission upon any such application shall be in writing and signed by at least a majority of its members, and shall be filed, together with the application and all plans, maps, surveys and other papers or records relating thereto, in its office, and a copy of the decision certified under seal of the commission shall be

forthwith served upon the applicant or his attorney or agent named in the application, which copy shall be evidence in all courts and places. The approval of the commission shall constitute the State's assent to the diversion of water and the construction and operation of the water works in accordance with the terms of the decision and the plans filed therewith. The decisions of the commission shall at all times be subject to review by the courts for reasonableness, legality or form.

4. The commission shall have power to subpœna and require the attendance before it of witnesses, and the production of books and papers pertinent to the investigation and inquiries which it is by this act authorized to make, and to examine them or such public records as it shall require in relation thereto. In the event of any person or corporation refusing to obey said subpœna he or it may be punished as for contempt of the Supreme Court, on application by petition to a justice of said court.

5. The commission shall also have power to require annual reports from all municipal corporations, corporations or persons diverting water for water supply purposes, as to the amount of water diverted by them, the communities and population supplied, the rates charged, and such other matters as shall be requisite to a proper supervision of the water supplies of the State and the development and public use thereof. It shall be the duty of the officers in control of municipal or other water works to keep accurate records, by meters or other approved methods, of the amount of water used, and to report the same quarter yearly to said commission. The commission shall also have power to make such investigations of the meters and records of said corporations of the water diverted as may be necessary to determine all matters pertinent to their duties. It shall also have power to examine the plants and works of all public water supplies in the State, to aid it in ascertaining the sources of the supply.

6. The commission shall have an official seal. The term of each member thereof shall be for five years, except that

the members of the said commission first appointed shall hold office, respectively, one for one year, one for two years, one for three years, one for four years and one for five years. The members of the commission shall receive an annual salary of two thousand five hundred dollars each, to be paid monthly by the State Treasurer, and be paid their necessary and reasonable expenses actually incurred in the prosecution of their duties. The commission is hereby authorized and empowered to employ a secretary and such engineers, clerks and subordinates as the duties imposed upon it by this act may require, and to fix and pay the reasonable salaries and expenses of such subordinate officers for the purposes of this act. All expenses incurred by said commission shall be paid, by the State Treasurer, on warrant of the Comptroller, out of moneys to be annually appropriated for the purpose, upon vouchers duly approved by the president and attested by the secretary of the commission.

7. The commission shall annually, on or before the thirtieth day of November of each year, submit a written report in detail of its proceedings during the preceding year to the Governor.

8. Every municipality, corporation or private person now diverting the waters of streams or lakes with outlets for the purpose of a public water supply shall make annual payments on the first day of May to the State Treasurer for all such water hereafter diverted in excess of the amount now being legally diverted; *provided, however,* no payment shall be required until such legal diversion shall exceed a total amount equal to one hundred (100) gallons daily, per capita for each inhabitant of the municipality or municialities supplied, as shown by the census of one thousand nine hundred and five. And every municipality, corporation or private person not at present diverting surface waters for said purpose, but who shall hereafter divert such waters, shall make annual payments on the first day of May to the State Treasurer for all waters diverted in excess of a total of one hundred (100) gallons daily for each inhabitant of the municipality or municipalities supplied, as shown by

the census of one thousand nine hundred and five. Such payment shall be deemed to be a license and its amount shall be fixed by said commission at a rate of not less than one dollar ($1.00) or more than ten dollars ($10.00) per million gallons. If at all times an amount equal to the average daily flow for the driest month, as shown by the existing records, or in lieu thereof one hundred and twenty-five thousand gallons daily for each square mile of unappropriated watershed above the point of diversion, shall be allowed to flow down the stream, the commission shall fix the minimum rate and may increase the rate proportionally as a less amount is allowed to flow down the stream below the point of diversion, due account being taken in fixing said increase both of the duration and amount of said deficiency; *provided, however,* the aforesaid one hundred and twenty-five thousand gallons daily for each square mile of unappropriated watershed shall be additional to the dry-season flow or any part thereof which may be allowed to flow down from any appropriated watershed or watersheds above said point of diversion. Water diverted within the corporate limits of a municipality for manufacturing and fire purposes only, and returned without pollution to the stream from which it was taken within said corporate limits shall not be reckoned in making up the aggregate amount diverted. Said commission shall certify to the State Comptroller, as soon as practicable after the first day of January, and not later than the fifteenth day of February of each year, the names of all municipalities, corporations or private persons owing money to the State for the diversion of water during the preceding year, with the amount so due. The State Comptroller shall promptly notify said municipalities, water companies or private persons of their indebtedness to the State, and in case said amounts are not paid the State Treasurer on or before the first day of July of the same year, the State Comptroller shall certify to the Attorney-General for collection the names of such delinquent municipalities, water companies or private persons and the amounts due from each, and it shall be the duty of the Attorney-

General to take immediate steps to collect the same in the name of the State. Any party aggrieved by the action of the commission, upon filing written complaint on or before March twentieth, shall be heard and permitted to give evidence of the facts, and the sum fixed may be changed, reduced or canceled, as the facts may warrant. All sums received as above provided shall be credited by the State Treasurer to a special fund, to be used by said commission as the Legislature may direct for the control of the waters and conservation of the water supplies of the State. The provisions herein contained as to payment to the State for water diverted from surface sources shall not apply to water obtained from wells. Nothing in this act shall be construed to confer upon any municipality, corporation or person any franchise not already possessed by said municipality, corporation or person, but the approval of the said commission contained in its decision as above provided shall constitute the assent of the State to the diversion of water as against the State in accordance with the terms of said decision.

9. The said commission, with the assistance of expert engineers, shall examine the plans for storage or other reservoirs heretofore or hereafter made by any bureau, department or commission of the State, and shall advise the Legislature as soon as practicable, as to the need of such reservoir or reservoirs; which plans best meet these needs; the benefits, cost of construction and maintenance thereof; the revenue to be derived therefrom and methods by which such plans may be carried out. It shall be the duty of every such bureau, department or commission to furnish said Water Supply Commission all information in its possession regarding their respective plans, in order that said Water Supply Commission may be able to take full advantage of all surveys, estimates and investigations theretofore made. The sum of ten thousand dollars is hereby appropriated to pay the expenses of the investigations in this section referred to. Nothing in this act shall be construed to authorize the commission to grant to any private corporation or persons the right to construct either of the reservoirs heretofore proposed for flood control in the Passaic River.

10. All acts and parts of acts inconsistent with this act be and the same are hereby repealed, and this act shall take effect immediately.

Approved June 17, 1907.

# Supreme Court of the United States

## October Term, 1922
## No. 430

THE CITY OF TRENTON,
*Plaintiff in Error.*

vs.

THE STATE OF NEW JERSEY

**Act of June 17, 1907, being Chapter 252 of Laws of 1907, establishing a State Water Supply Commission and defining its powers and duties and the conditions under which waters of the State of New Jersey may be diverted, printed at length for the convenience of the Court.**

Submitted by
CHAS. E. BIRD,
A. V. DAWES,
*Attorneys and Counsel for City of Trenton, Plaintiff in Error.*

Royal Printing Co., Inc., Trenton, N. J.

## LAWS, SESSION OF 1907, CHAPTER 252

An Act to establish a State Water-Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The Governor, by and with the advice and consent of the Senate, shall appoint five citizens of this State to constitute a commission to be known as the State Water-Supply Commission. The Commission shall make necessary rules and regulations for the performance of its duties. It shall be charged with a general supervision over all the sources of potable and public water-supply, to the end that the same may be economically and prudently developed for the use of the people of this State.

2. No municipal corporation, corporation or person engaged in supplying or proposing to supply the inhabitants of any municipal corporation with water, shall have power to condemn lands or water for any new or additional source of water-supply, or to divert water from such new or additional source until such municipal corporation, corporation or person has first submitted descriptions thereof, which may be accompanied by maps and plans, to said commission, and until said commission shall have approved the same; **provided,** nothing in this section shall be interpreted to restrict any municipality in acquiring, by purchase or condemnaion, any existing or operating water works supplying said

municipality with water; **and provided further,** that where any such municipal corporation, corporation or person has already acquired lands or water, and has in good faith commenced the construction of works for such new or additional water-supply, this section shall not apply to construction or lands or water necessary to complete such works , or to put in use such water-supply, if maps, plans and descriptions of such lands, works and water-supplies shall be filed with the commission within ninety days of the approval of this act. Nothing in this act contained shall be construed to take from any municipality in this State the right to use and take all the water which it has the right to use or appropriate by purchase or condemnation.

3. Any municipal corporation, corporation or person may make application by petition, in writing, to the said commission for the approval of its plans for obtaining such new or additional source of water-supply, which application shall show the sources of the proposed supply, the approximate location of the proposed reservoirs or other works, with their estimated capacities, an abstract of any official reports relating to the same, and showing the need for an added supply, and the reasons for the choice made. The commission shall therupon give notice, by advertisement in one or more newspapers published in the vicinity, of a public hearing, at which all persons or municipalities affected by the proposed plans may be heard for or against the granting of the application. After due hearing, the commission shall decide whether the plans proposed are justified by public necessity or reasonably anticipated public use, and whether such plans interfere unduly with the opportunity of other municipalities to obtain a water-supply by the taking of waters

necessary for their use, or whether the reduction of the dry-season flow of any stream will be caused to an amount likely to produce unsanitary conditions or otherwise unduly injure public or private interests. Such commission shall, within ninety days after receiving the application, and with all convenient speed, either approve such application, eject it entirely, or approve the same subject to such reasonable terms and conditions as the commission may prescribe. The decision of the commission upon any such application shall be in writing and signed by at least a majority of its members, and shall be filed, together with the application and all plans, maps, surveys and other papers or records relating thereto, in its office, and a copy of the decision certified under seal of the commission shall be forthwith served upon the applicant or his attorney or agent named in the application, which copy shall be evidence in all courts and places. The approval of the commission shall constitute the State's assent to the diversion of water and the construction and operation of the water-works in accordance with the terms of the decision and the plans filed therewith. The decisions of the commission shall at all times be subject to review by the courts for reasonableness, legality or form.

4. The commission shall have power to subpoena and require the attendance before it of witnesses, and the production of books and papers pertinent to the investigation and inquiries which it is by this act authorized to make, and to examine them or such public records as it shall require in relation thereto. In the event of any person or corporation refusing to obey said subpoena he or it may be punished as for contempt of the Supreme Court, on application by petition to a justice of said court.

5. The commission shall also have power to require annual reports from all municipal corporations, corporations or persons diverting water for water-supply purposes, as to the amount of water diverted by them, the communities and population supplied, the rates charged, and such other matters as shall be requisite to a proper supervision of the water-supplies of the State and the development and public use therof. It shall be the duty of the officers in control of muncipal or other water-works to keep accurate records, by meters or other approved methods, of the amount of water used, and to report the same quarter yearly to said commission. The commission shall also have power to make such investigations of the meters and records of said corporations of the water diverted as may be necessary to determine all matters pertinent to their duties. It shall also have power to examine the plants and works of all public water-supplies in the State, to aid it in ascertaining the sources of the supply.

6. The commission shall have an official seal. The term of each member thereof shall be for five years, except that the members of the said commission first appointed shall hold office, respectively, one for one year, one for two years, one for three years, one for four years and one for five years. The members of the commission shall receive an annual salary of two housand five hundred dollars each, to be paid monthly by the State Treasurer, and be paid their necessary and reasonable expenses actually incurred in the prosecution of their duties. The commission is hereby authorized and empowered to employ a secretary and such engineers, clerks and subordinates as the duties imposed upon it by this act may require, and to fix and pay the reasonable salaries and expenses of such subordinate officers for the purposes of this

act. All expenses incurred by said commission shall be paid, by the State Treasurer, on warrant of the Comptroller, out of moneys to be annually appropriated for the purpose, upon vouchers duly approved by the president and attested by the secretary of the commission.

7. The commission shall annually, on or before the thirtieth day of November of each year, submit a written report in detail of its proceedings during the preceding year to the Governor.

8. Every municipality, corporation or private person now diverting the waters of streams or lakes with outlets for the purpose of a public water-supply shall make annual payments on the first day of May to the State Teasurer for all such water hereafter diverted in excess of the amount now being legally diverted; **provided, however,** no payment shall be required until such legal diversion shall exceed a total amount equal to one hundred (100) gallons daily, per capita for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. And every municipality, corporation or private person not at present diverting surface waters for said purpose, but who shall hereafter divert such waters, shall make annual payments on the first day of May to the State Treasurer for all waters diverted in excess of a total of one hundred (100) gallons daily for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. Such payment shall be deemed to be a license and its rate of not less than one dollar ($1.00) or more amount shall be fixed by said commission at a than ten dollars ($10.00) per million gallons. If at all times an amount equal to the average flow for the driest month, as shown by existing

records, or in lieu thereof one hundred and twenty-five thousand gallons daily for each square mile of unappropriated watershed above the point of diversion, shall be allowed to flow down the stream, the commission shall fix the minimum rate and may increase the rate proportionally as a less amount is allowed to flow down the stream below the point of diversion, due account being taken in fixing said increase both of the duration and amount of said deficiency; **provided, however,** the aforesaid one hundred and twenty-five thousand gallons daily for each square mile of unappropriated watershed shall be additional to the dry-season flow or any part thereof which may be allowed to flow down from any appropriated watershed or watersheds above said point of diversion. Water diverted within the corporate limits of a municipality for manufacturing and fire purposes only, and returned without pollution to the stream from which it was taken within said corporate limits shall not be reckoned in making up the aggregate amount diverted. Said commission shall certify to the State Comptroller, as soon as practicable after the first day of January, and not later than the fifteenth day of February of each year, the names of all municipalities, corporations or private persons owing money o the State for the diversion of water during the preceding year, with the amount so due. The Stae Comptroller shall promptly notify said municipalities, water companies or private persons of their indebtedness to the State, and in case said amounts are not paid the State Treasurer on or before the first day of July of the same year, the State Comptroller shall certify to the Attorney-General for collection the names of such delinquent municipalities, water companies or private persons and the amounst due from each, and it shall be the duty of the Attorney-

General to take immediate steps to collect the same in the name of the State. Any party aggrieved by the action of the commission, upon filing written complaint on or before March twentieth, shall be heard and permitted to give evidence of the facts, and the sum fixed may be changed, reduced or cancelled, as the facts may warrant. All sums received as above provided shall be credited by the State Treasurer to a special fund, to be used by said commission as the Legislature may direct for the control of the waters and conservation of the water-supplies of the State. The provisions herein contained as to payment to the State for water diverted from surface sources shall not apply to water obtained from wells. Nothing in this act shall be construed to confer upon any municipality, corporation or person any franchise not already possessed by said municipality, corporation or person, but the approval of the said commission contained in its decision as above provided shall constitute the assent of the State to the diversion of water as against the State in accordance with the terms of said decision.

9. The said commission, with the assistance of expert engineers, shall examine the plans for storage or other reservoirs heretofore or hereafter made by any bureau, department or commission of the State, and shall advise the Legislature, as soon as practicable, as to the need of such reservoir or reservoirs; which plans best meet these needs; the benefits, cost of construction and maintenance thereof; the revenue to be derived therefrom and methods by which such plans may be carried out. It shall be the duty of every such bureau, department or commission to furnish said Water-Supply Commission all information in its possession regarding their respective plans, in order that said

Water-Supply Commission may be able to take full advantage of all surveys, estimates and investigations theretofore made. The sum of ten thousand dollars is hereby appropriated to pay the expenses of the investigations in this section referred to. Nothing in this act shall be construed to authorize the commission to grant to any private corporation or persons the right to construct either of the reservoirs heretofore proposed for flood control in the Passaic river.

10. All acts and parts of acts inconsistent with this act be and the same are hereby repealed, and this act shall take effect immediately.

Approved June 17, 1907.

# CITY OF TRENTON *v.* STATE OF NEW JERSEY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

No. 430. Argued March 2, 1923.—Decided May 7, 1923.

1. A State has power, and it is its duty, to control and conserve its water resources for the benefit of all its inhabitants. P. 185.
2. Diversion of waters from the sources of supply for this use, is a legitimate function of the State, which may be left to private enterprise subject to state regulation, or be performed directly, or be delegated either to bodies politic created for the purpose or to the State's municipalities. P. 185.
3. In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the State, but are merely departments of the State, with powers and privileges such as the State has seen fit to grant, held and exercised subject to its sovereign will. P. 187.
4. The power of a State over the rights and properties of cities held and used for "governmental purposes," is unrestrained by the Contract Clause, or the Fourteenth Amendment, of the Federal Constitution. P. 188.
5. The distinction between a municipality as an agent of the State for governmental purposes, and as an organization to care for local needs in a private or proprietary capacity, affords no ground for the application of those constitutional restraints against a State in favor of its own municipality. P. 191.
6. The City of Trenton, as successor to a grant made by New Jersey to a private corporation, claimed a perpetual right, unburdened by license fee or other charge, to divert all the water that might be required for the use of the City or its inhabitants from the Delaware River, and resisted a charge, imposed under c. 252, Laws N. J., 1907, for water diverted beyond the amount being legally diverted when the act was passed and in excess of a *per capita* maximum prescribed by the act. *Held*, that the City could not invoke the Contract Clause or the Fourteenth Amendment, even assuming that the private corporation might have done so if its rights had not passed to the City, and that, in view of previous decisions, the City's contention to the contrary did not present a substantial federal question. Pp. 185, 192.

Writ of error to review 117 Atl. 158, dismissed.

ERROR to a judgment of the Supreme Court of New Jersey, affirmed by the Court of Errors and Appeals, in favor of the State, in its action to recover license fees from the City of Trenton, for water diverted from the Delaware River.

*Mr. A. V. Dawes*, with whom *Mr. Chas. E. Bird* was on the brief, for plaintiff in error.

*Mr. William Newcorn*, Assistant Attorney General, with whom *Mr. Thomas F. McCran*, Attorney General, of the State of New Jersey, was on the brief, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The State of New Jersey recovered judgment against the City of Trenton for $14,310.00, in an action brought in the State Supreme Court. The judgment was affirmed by the Court of Errors and Appeals, and is here on writ of error.

The State's right to recover depends upon the validity of an act of the legislature (c. 252, Laws of 1907). The City asserts that this act offends against the contract clause of the Constitution of the United States, and that it takes property owned by the City in its private or proprietary capacity for public use without just compensation and without due process of law in violation of the Fourteenth Amendment. The act provides that:

"Every municipality, corporation or private person now diverting the waters of streams or lakes with outlets for the purpose of a public water-supply shall make annual payments on the first day of May to the State Treasurer for all such water hereafter diverted in excess of the amount now being legally diverted; *provided, however*, no payment shall be required until such legal diversion shall exceed a total amount equal to one hundred

(100) gallons daily, per capita for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five."

The City claims the right to take from the Delaware River all the water that it requires without limitation as to quantity and without license fee for any part thereof, and that such right was acquired by the President and Directors of the Trenton Water Works (hereinafter called the water company) by grant direct from the State March 24, 1852, and that the City acquired this right by purchase from the water company. Briefly, the basis of the City's claim is as follows: By an Act of February 29, 1804, the President and Directors of the Trenton Water Works were created a body politic and corporate. They and their successors and assigns were made capable of disposing of water to such as might apply for the same for such annual rent and under such restrictions as they might think proper, and they were authorized to lay and extend their water mains through the streets of the City. Certain springs constituted the company's source of supply, and by reason of increase of population ceased to be adequate. March 24, 1852, a supplement to the above mentioned act was passed, by which the company was authorized to take the water required either in whole or in part from the Delaware River. Later, March 2, 1855, an act was passed, authorizing the City to purchase the whole or a majority of the shares of the capital stock of the water company, and the City purchased all of the stock. Thereafter, an Act of March 1, 1859, required the company to convey unto "the inhabitants of the city of Trenton" all the real estate, works and property and all the corporate powers, franchises and privileges of the company, and this conveyance was duly made.

If the provision of the Act of 1907 imposing the license fee is valid as against the City, the judgment is right.

The Court of Errors and Appeals held that it was valid; that the State under its police power might impose a license fee as specified in the act, and that this does not deprive the City of any contractual or property right.

The State undoubtedly has power, and it is its duty, to control and conserve the use of its water resources for the benefit of all its inhabitants, and the Act of 1907 was passed pursuant to the policy of the State to prevent waste and to economize its water resources. Decision of the Court of Errors and Appeals in this case, 117 Atl. 158; *McCarter* v. *Hudson Water Co.*, 70 N. J. Eq. 695, 701, 702, affirmed by this Court in 209 U. S. 349, 355; *Collingswood* v. *Water-Supply Commission*, 84 N. J. L. 104, 110; *Cobb* v. *Davenport*, 32 N. J. L. 369, 378. The only way the City could acquire the right to take the water of the Delaware River was by grant from the State or by authorized purchase or condemnation from one to whom the right had been granted by the State. *State* v. *Jersey City*, 94 N. J. L. 431, 433. The power to determine the conditions upon which waters may be so diverted is a legislative function. The State may grant or withhold the privilege as it sees fit. Assuming in favor of the City, that its grantor received a perpetual right, unburdened by license fee or other charge, to divert all the water required for the use of the City and its inhabitants, does it follow that the State as against the City is bound by contract and is without power to impose a license fee as provided in the act?

The relations existing between the State and the water company were not the same as those between the State and the City. The company was organized and carried on its business for pecuniary profit. Its rights and property were privately owned and therefore safeguarded by the constitutional provisions here sought to be invoked by the City against the legislation of the State. The City is a political subdivision of the State, created as a con-

venient agency for the exercise of such of the governmental powers of the State as may be entrusted to it. The diversion of waters from the sources of supply for the use of the inhabitants of the State is a proper and legitimate function of the State. This function may be left to private enterprise, subject to regulation by the State; it may be performed directly; or it may be delegated to bodies politic created for that purpose, or to the municipalities of the State. Power to own, maintain and operate public utilities, such as waterworks, gas and electric plants, street railway systems, public markets, and the like is frequently conferred by the States upon their cities and other political subdivisions. For the purpose of carrying on such activities, they are given power to hold and manage personal and real property.

As said by this Court, speaking through Mr. Justice Moody, in *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178, 179:

"The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitu-

tion, may do as it will, unrestrained by any provision of the Constitution of the United States. . . . The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

In New Jersey it has been held that within the limits prescribed by the state constitution, the legislature may delegate to municipalities such portion of political power as they may deem expedient, withholding other powers, and may withdraw any part of that which has been delegated. *Van Cleve* v. *Passaic Valley Sewerage Commissioners*, 71 N. J. L. 183, 198.

In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self government which is beyond the legislative control of the State.[1] A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will. See *Barnes* v. *District of Columbia*, 91 U. S. 540, 544, 545.

In *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 524, 525, it was held that where a municipal corporation is legislated out of existence and its territory annexed to other corporations, the latter, unless the legislature otherwise provides, become entitled to all its property and immunities. In the opinion it is said (pp. 524, 525):

"Institutions of the kind, whether called cities, towns, or counties, are the auxiliaries of the State in the important business of municipal rule; but they cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between themselves and the legislature of the State, because there is

[1] Cf. 1 Dillon Municipal Corporations, 5th ed., § 98, p. 154, et seq.

not and cannot be any reciprocity of stipulation between the parties, and for the further reason that their objects and duties are utterly incompatible with everything partaking of the nature of compact."

The power of the State, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for "governmental purposes" cannot be questioned. In *Hunter* v. *Pittsburgh*, *supra*, 179, reference is made to the distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private or proprietary capacity, and decisions of this Court which mention that distinction are referred to.[2] In none of these cases was any power, right or property of a city or other political subdivision held to be protected by the contract clause or the Fourteenth Amendment. This Court has never held that these subdivisions may invoke such restraints upon the power of the State.[3]

In *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, 533, 534, 536, it appeared that for many years a franchise to operate a ferry over the Connecticut River belonged to the town of Hartford; that upon the incorporation of

[2] *Commissioners* v. *Lucas*, 93 U. S. 108, 115; *Meriwether* v. *Garrett*, 102 U. S. 472, 518, 530; *Essex Public Road Board* v. *Skinkle*, 140 U. S. 334, 342; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 91; *Covington* v. *Kentucky*, 173 U. S. 231, 240; *Worcester* v. *Worcester Consolidated Street Ry. Co.*, 196 U. S. 539, 551; *Monterey* v. *Jacks*, 203 U. S. 360.

[3] Some state cases holding that the state legislature is not restrained by federal constitutional provisions: *St. Louis* v. *Shields*, 52 Mo. 351, 354; *Police Jury of Bossier* v. *Corporation of Shreveport*, 5 La. Ann. 661, 665; *Trustees of Schools* v. *Tatman*, 13 Ill. 27; *Board of Education* v. *Aberdeen*, 56 Miss. 518; *Darlington* v. *City of New York*, 31 N. Y. 164, 193. See contra: *Town of Milwaukee* v. *City of Milwaukee*, 12 Wis. 93, 109; *Grogan* v. *San Francisco*, 18 Cal. 590, 612, 613; *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509, 519; *Spaulding* v. *Andover*, 54 N. H. 38, 56; *Ellerman* v. *McMains*, 30 La. Ann. 190.

East Hartford, the legislature granted to it one-half of the ferry during the pleasure of the General Assembly, and that subsequently, after the building of a bridge across the river, the legislature discontinued the ferry. It was held that this was not inconsistent with the contract clause of the Federal Constitution. The reasons given in the opinion (pp. 533, 534) support the contention of the State here made that the City cannot possess a contract with the State which may not be changed or regulated by state legislation.

In *Worcester* v. *Worcester Consolidated Street Ry. Co.*, 196 U. S. 539, 548, it was held that the obligation of the street railway company to the city to pave and repair streets occupied by it, based on accepted conditions of a municipal ordinance granting right of location, is not private property beyond the legislative control of the State, and that state legislation taxing the company and thereby relieving it from its obligation to the city to pave and repair such streets was not void as violating the contract clause of the Federal Constitution. In the opinion it is said (pp. 548, 549):

"The question then arising is, whether the legislature, in the exercise of its general legislative power, could abrogate the provisions of the contract between the city and the railroad company with the assent of the latter, and provide another and a different method for the paving and repairing of the streets through which the tracks of the railroad company were laid under the permit of their extended location. We have no doubt that the legislature of the Commonwealth had that power. A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of

the former city. The city is the creature of the State." Citing *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, 533, 534; *United States* v. *Railroad Company*, 17 Wall. 322, 329; *New Orleans* v. *Clark*, 95 U. S. 644, 654; *Commissioners of Laramie County* v. *Commissioners of Albany County*, 92 U. S. 307; *Commissioners* v. *Lucas*, 93 U. S. 108, 114.

In *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U. S. 394, 399, it was held that a legislative grant to a city of the power to regulate rates to be charged to the city and its inhabitants by a gas company might be withdrawn by the State from the city and conferred upon a commission, and that thereby no question was presented under the contract clause of the Federal Constitution. In the opinion, after a statement of the issue, it is said (pp. 397, 398):

"Thus the whole controversy is as to which of two existing agencies or arms of the state government is authorized for the time being to exercise in the public interest a particular power, obviously governmental, subject to which the franchise confessedly was granted. In this no question under the contract clause of the Constitution of the United States is involved, but only a question of local law, the decision of which by the Supreme Court of the State is final. . . . In *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, where a city, relying on the contract clause, sought a review by this court of a judgment of a state court sustaining a statute so modifying the franchise of a water works company as to require the city to pay for water used for municipal purposes, to which it theretofore was entitled without charge, the writ of error was dismissed on the ground that no question of impairment within the meaning of the contract clause was involved." [4]

[4] Cf. *Williams* v. *Eggleston*, 170 U. S. 304, 310; *Mason* v. *Missouri*, 179 U. S. 328, 335.

The distinction between the municipality as an agent of the State for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. The most numerous illustrations are found in cases involving the question of liability for negligent acts or omissions of its officers and agents. See *Harris* v. *District of Columbia,* 256 U. S. 650, and cases cited. It has been held that municipalities are not liable for such acts and omissions in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and courthouse, the protection of the city's inhabitants against disease and unsanitary conditions, the care of the sick, the operation of fire departments, the inspection of steam boilers, the promotion of education and the administration of public charities. On the other hand, they have been held liable when such acts or omissions occur in the exercise of the power to build and maintain bridges, streets and highways, and waterworks, construct sewers, collect refuse and care for the dump where it is deposited.[8] Recovery is denied where the act or omission occurs in the exercise of what are deemed to be governmental powers, and is permitted if it occurs in a proprietary capacity. The basis of the distinction is difficult to state, and there

[8] See *Winona* v. *Botzet,* 169 Fed. 321, 332, et seq., and cases cited. See also: *Brantman* v. *Canby,* 119 Minn. 396 (recovery permitted for gas explosion where city furnished gas to inhabitants); *Pettengill* v. *Yonkers,* 116 N. Y. 558, 565 (recovery permitted for injury sustained by excavation in street to lay mains); *Watson* v. *Needham,* 161 Mass. 404, 411 (damages recovered for breach of contract by water commissioners to furnish water for plaintiff's boiler, resulting in injury to vegetables in greenhouse heated thereby); *Brown* v. *Salt Lake City,* 33 Utah, 222, 234 (city held liable for death by drowning in conduit forming a part of city water works system). These cases and others that might be cited serve in general to illustrate the course of decision.

is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations.[6] But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the State in favor of its own municipalities. We hold that the City cannot invoke these provisions of the Federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question. In view of former opinions of this Court, no substantial federal question is presented. *Pawhuska* v. *Pawhuska Oil & Gas Co., supra,* and cases cited.[7]

*The writ of error is dismissed.*